SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 13, 1933

[fol. 1]

IN SUPERIOR COURT OF SAN DIEGO COUNTY

No. 69636

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

vs.

GEORGE MORRISON and H. DOI, Defendants

AMENDED INDICTMENT FOR CONSPIRACY TO VIOLATE THE ALIEN LAND LAW OF THE STATE OF CALIFORNIA

The Grand Jury of the County of San Diego, State of California, do hereby accuse George Morrison and H. Doi of a felony, to-wit: the crime of Conspiracy to violate the provisions of that certain statute submitted by Initiative, proposed to and adopted by the electors of the State of California at the general election of November 2, 1920, and as thereafter amended, entitled "An Act Relating to the Rights, Powers, and Disabilities of Aliens and of certain Companies, Associations and Corporations with respect to Property in this State, providing for Escheats in certain cases, Prescribing the Procedure therein, Requiring Reports of certain Property Holders to Facilitate the Enforcement of this Act, Prescribing Penalties for Violation of the Provisions hereof, and Repealing all Acts or parts of Acts Inconsistent or in Conflict herewith," and commonly known as the Alien Land Law of the State of California, committed as follows: to wit: the said George Mor-
[fol. 2] rison and H. Doi, and divers other persons to the grand jurors unknown, in the County of San Diego, State of California, on or about the 27th day of August, 1931, and before the finding of this indictment, did wilfully, unlawfully and feloniously combine, conspire, confederate and agree together by divers unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation, and occupancy, for agricultural purposes by the said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation, and occupancy, for agricultural purposes,

and to the use and beneficial interest of the said H. Doi of all that certain parcel of land described as follows, to wit:

Westerly three (3) acres more or less of five acre lot ten (10) in one-quarter (¼) section 144, Rancho de la Nacion, which said land was and is agricultural land and fit and suitable for agricultural purposes; that the said H. Doi then and there was, and now is, an alien ineligible to citizenship under the laws of the United States, and then and there was a citizen and subject of the Empire of Japan, and was not and is not authorized by law or any treaty between the United States and the Empire of Japan, or any other nation or country, to acquire, possess, enjoy, use, [fol. 3] cultivate or occupy real property, nor to have, either in whole or in part, any beneficial use of or interest in real property within the State of California for agricultural purposes.

And thereafter, and while the said conspiracy was in existence and in effect, to wit, on or about the 13th day of August, 1931, and in furtherance of and to accomplish and effect the purposes and objects of the said conspiracy, the said George Morrison and H. Doi, and each of them, in the County of San Diego, State of California, did commit the following acts:

The said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land hereinabove described, and the said H. Doi did go into possession of the said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for his own use and benefit, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

Thomas Whelan, District Attorney of the County of San Diego, by John T. Holt, Deputy District Attorney.

[fol. 4] IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

ARRAIGNMENT AND PLEA—Feb. 17, 1932

This being the time to which the above entitled cause was continued for arraignment, comes now the District Attor-

ney by John Holt, Esq., and come the defendants in person and by counsel, E. B. Hervey, Esq., into court. The defendants waive the reading of the indictment, and upon being arraigned each of the defendants pleads that he is not guilty of the offense charged in the indictment, and by consent of counsel, said cause is set for trial on Monday, March 14th, 1932, at 9:00 A. M. thereof.

[fol. 5] IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

STIPULATION AS TO CERTAIN FACTS

It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultiva-
[fol. 6] tion and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and har-

vest crops thereon, for the use and benefit of said defendants and each of them."

Dated this 31st day of March, 1932.

Thomas H. Whelan, T. W., District Attorney of the County of San Diego, State of California, by John T. Holt, Deputy; J. Marion Wright, W. K. Brown, Edgar B. Hervey, by Edgar B. Hervey, Attorneys for Defendants."

The Court: This may be considered then as the evidence in the case?

Mr. Whelan: Yes. The People rest with that.

Mr. Hervey: The defendants rest, Your Honor.

[fol. 7] IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

MINUTE ENTRY OF TRIAL—March 31, 1932

This being the time set for trial in the above entitled cause, comes now the District Attorney Thomas Whelan and John T. Holt, Deputy; the defendants in person and by their attorney Edgar Hervey; Kate Marcellus official phonographic reporter takes down the testimony and proceedings herein.

Each of said defendants personally ask leave to waive trial by jury, same being stipulated to by the District Attorney, it is by the Court so ordered, whereupon the District Attorney offers in evidence a stipulation, and the People rest.

Defendants move for dismissal under action of Alien Land Law on the amended indictment on file herein on behalf of the defendant H. Doi, motion is argued and by the Court denied. T. Tanigashi is sworn as interpretor on behalf of H. Doi who thereupon is sworn and examined. [fol. 8] Each defendant is by the Court found guilty, whereupon defendants waive time for pronouncement of Judgment and make application for probation, and by the Court time for pronouncement of Judgment and hearing upon defendants application for probation is set for Friday, April 1st, 1932, at 1:30 P. M.

[fol. 9] IN SUPERIOR COURT OF SAN DIEGO COUNTY

[Title omitted]

MOTION FOR NEW TRIAL—Filed April 1, 1932

Come now the defendants, George Morrison and H. Doi, and do jointly and severally move this Hon. Court for a new trial in the above entitled cause upon the ground that:

I

The decision and/or judgment of the Court, finding the defendants and each of them guilty of the offense as charged in the amended indictment herein, is contrary to law; that the decision and/or judgment of the Court is contrary to the evidence; that the said decision and/or judgment of the Court is contrary to the law and the evidence.

II

That the Corpus Delicti in the above entitled cause was not established as to the defendant George Morrison; that the Corpus Delicti was not established as to the defendant [fol. 10] H. Doi.

III

That Sections 9a and 9b of the Alien Land Law of the State of California are unconstitutional; that Section 9a of the Alien Land Law of the State of California is unconstitutional; that Section 9b of the Alien Land Law of the State of California is unconstitutional; that Section 9a of the Alien Land Law of the State of California is in conflict with the Constitution of the State of California; that Section 9b of the Alien Land Law of the State of California is in conflict with the Constitution of the State of California; that Section 9a of the Alien Land Law of the State of California is in conflict with the Constitution of the United States; that Section 9b of the Alien Land Law of the State of California is in conflict with the Constitution of the United States.

IV

That Sections 9a and 9b of the Alien Land Law of the State of California are, and each of them is, in conflict with

the following provisions, and each of the following provisions, of the Constitution of the State of California, to-wit, Article I, Sections 1, 13, 17 and 21.

V

That Sections 9a and 9b of the Alien Land Law of the [fol. 11] State of California are, and each of them is, in conflict with the following provisions, and each of the following provisions, of the Constitution of the United States, to-wit, Article V, Article VI and Article XIV, Section 1.

Dated this 1st day of April, 1932.

J. Marion Wright, W. K. Brown, and Edgar B. Hervey, by Edgar B. Hervey, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 12] In Superior Court of San Diego County, Department Six

No. 69636

People of the State of California, Plaintiff,

vs.

George Morrison & H. Doi, Defendants

Judgment—April 1, 1932

This being the time set for pronouncement of Judgment, and hearing on defendants' application for probation, comes now the District Attorney by John T. Holt, Deputy, the defendants in person and by their attorney, Edgar Hervey; Kate Marcellus official phonographic reporter takes down the testimony and proceedings herein.

Defendants' counsel presents motion for new trial, and upon stipulation it is considered read into the record, and said motion is by the Court denied, whereupon the defendants are asked if they have any legal cause why sentence should not be pronounced at this time, and each answering in the negative, George Morrison is questioned by the Court and sentenced to the State Prison at San Quentin for the

term prescribed by law, and said defendant is granted probation for the term of two years, and sentence suspended during the term of probation, said term to run concurrently.

[fol. 13] H. Doi is called and E. Kawamura is duly sworn as interpretor whereupon H. Doi is sworn and examined by the Court, and Judgment rendered sentencing said defendant to the State Prison at San Quentin for the term prescribed by law; and said defendant is granted probation for the term of two years, and sentence imposed suspended during the term of said probation.

The District Attorney by John T. Holt, Deputy, makes recommendation that probation be granted without defendants paying a fine or being confined for any period as a part of the probation.

Defendants file statement of grounds for appeal and points relied upon.

[fol. 14] IN SUPREME COURT OF CALIFORNIA

Crim. No. 3601. In Bank. June 1, 1933

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

v.

GEORGE MORRISON and H. DOI, Defendants and Appellants

(1) Alien Land Law—Burden of Proof—Constitutional Law.—The provisions of section 9a of the Alien Land Act (Stats. 1927, p. 880), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the state under the provisions of such act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or interest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are valid, and the enactment of such section was a valid exercise of the power of the legislature.

Appeal by defendants from a judgment of the Superior Court of San Diego County, A. C. Finney, Judge, of con-

viction of conspiracy to violate the Alien Land Act and from an order denying a new trial.

Affirmed. Curtis, J., dissents; Shenk and Preston, JJ., concurring.

On hearing after judgment in District Court of Appeal, Fourth District (70 Cal. App. Dec. 488), affirming judgment of Superior Court of conviction of conspiracy to violate the Alien Land Act. Judgment of Superior Court affirmed. Curtis, J., dissents; Shenk and Preston, JJ., concurring.

For Appellants: W. K. Brown, Edgar B. Hervey, J. Marion Wright.

For Respondent: Thomas Whelan, District Attorney; John T. Holt, Deputy District Attorney; U. S. Webb, Attorney General; Frank English, J. Charles Jones, James S. Howie, Deputies Attorney-General.

OPINION

This cause was transferred to this court after decision by the District Court of Appeal, Fourth District, Barnard, P. J., writing the opinion affirming the judgment.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of this state. (Stats. 1291, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881.) Section 13 of said initiative measure [fol. 15] provides that the legislature may amend said measure in furtherance of its purpose. Section 9a, which appellants claim violates the due process clause of the federal Constitution and denies to them equal protection of the law, was adopted as an amendment of said initiative measure by the legislature of 1927 (Stats. 1927, p. 880.) It provides as follows:

"In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest thereon, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility

to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

Section 1983, Code of Civil Procedure, which was passed by the same legislature that amended the Alien Land Act in the respect above set forth, prescribed as a rule of evidence that whenever ineligibility to citizenship is alleged in a civil or criminal proceeding brought to enforce any law which denies any right, privilege or license to any person not a citizen or not eligible to become a citizen of the United States, the burden rests upon the state or people to establish that such right, privilege or license was exercised by the person so alleged to have exercised the same, and upon such facts being so established the burden shall be upon the person claiming the right to exercise such right, privilege or license to show that at the time he exercised said rights he was a citizen of the United States or eligible to become such citizen. That section contains nothing of substance so far as the question is here involved that is not found in the amendment of the Alien Land Act of 1927. The only purpose it can serve is to make more emphatic the intention of the legislature to establish a rule of evidence which shall be applied in the class of cases of which the instant case is unquestionably one.

The indictment under which appellants were convicted alleged that they wilfully, unlawfully and feloniously combined and conspired by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes, by [fol. 16] the defendant Doi and for his use and benefit, of certain described real property situate in the county of San Diego, which real property is alleged to be agricultural in character. It is alleged that the defendant Doi was and is an alien ineligible to citizenship under the laws of the United States, and that he is a citizen and subject to the empire of Japan and not authorized by law or treaty to acquire, enjoy, occupy or to have any beneficial interest in any real property in this state for agricultural purposes. It is also alleged that in furtherance of said conspiracy, and for the purpose of accomplishing and effecting the purposes and objects thereof, the defendant Morrison put the

defendant Doi into possession of the agricultural land described, and permitted, aided and encouraged him to take possession thereof and to use, enjoy, cultivate and occupy the same, and that the defendant Doi took possession of said land, used, enjoyed, cultivated and occupied the same and raised and harvested crops thereon for his own use and benefit.

Trial by jury was waived and the action was tried before the court. The only evidence introduced consisted of the following stipulation: "It is stipulated that the defendant George Morrison is, and was at all times mentioned in the indictment, a native-born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

By the above stipulation it will be seen that the agricul-[fol. 17] tural character of the lands and the execution of the lease and the entry into the possession thereof by defendant H. Doi (alleged to be a citizen and subject of the empire of Japan) and all facts necessary under the Alien Land Act to sustain a conviction except ineligibility are admitted. The defendants having failed to offer any evi-

dence touching the qualification of Doi to exercise the rights of citizenship, or to meet the burden cast upon him, were adjudged guilty as charged, and released on probation. This appeal is from the judgment of conviction and order denying a new trial.

(1) Appellants' sole attack is made upon that portion of the decision in the case of People v. Osaki, 209 Cal. 169, which sustains the power of the legislature to cast the burden upon aliens charged in the manner provided by the acts in question to prove their eligibility to own, possess or occupy agricultural land. While it was pointed out in that case that the evidence produced by the prosecution was sufficient of itself to show that the accused was an ineligible alien without the necessity of invoking the aid of the burden of proof provisions of said amendment to the Alien Land Act and said statutes, the validity of such burden of proof provisions was nevertheless brought into question and considered by us at great length. In fact, by far the greater portion of the decision was given to a consideration of the validity of said sections which cast the burden of proof upon the accused. In our discussion of the question here pressed by appellants we said:

"We are of the view that the better reason supports the conclusion that the burden in cases involving questions of naturalization and a lienage has always been upon the defendant, who has intimate and previous knowledge of the fact."

Again we said:

"It is not intended by what we have said to extend the rule of convenience or burden of proof to common-law crimes generally designated as malum in se nor to all crimes malum prohibitum. We go no further than to apply the rule to the particular situation in accordance with the express mandate of said amendments."

Counsel for appellants recognize the relevancy and application of the authorities cited in the Osaki case to the instant case, and asks that we disapprove of the rule therein adopted and apply the doctrine announced in People v. Quarez, 196 Cal. 404. That case leans heavily upon People [fol. 18] v. Frey, 165 Cal. 140, which, as pointed out in the

Osaki case, was adopted by a bare majority of the court. People v. Quarez and People v. Frey and many other cases of our own and other jurisdictions were exhaustively considered in the Osaki case, and counsel in the instant case has presented no important authorities or additional arguments which were not drawn to our attention in the Osaki case. Both the Quarez and Frey cases recognize the rule ab inconvenienti, commonly known as the rule of necessity or convenience, but seek to limit its application to the prosecution of persons charged with the violation of statutes regulating the practice of medicine and other professions and certain callings which provide that a license shall first be obtained before any person may engage in the practice of said professions or callings. The rule of convenience or necessity is of common law origin and was a rule of evidence as early as 1816, a period long prior to the adoption of the modern system requiring persons to obtain a license before they may engage in particular callings, which system has become quite universal as conducive to public health and safety during the present and latter part of the past century.

Chief Justice Ellenborough recognized the rule more than a century ago in the case of King v. Turner, 5 Maule and Selwyn's Reports, 206. This early case did not involve the question of licensing a calling, but was bottomed on the want of qualification on the part of the accused for having game in his possession. The identical principle is presented in the instant case, to-wit, a want of qualification to enjoy an exclusive privilege of citizenship. Lord Ellenborough states the question as being one upon whom the onus probandi lies; whether it lies upon the person who affirms a qualification to prove the affirmative, or upon the prosecutor who denies any qualification to prove the negative. He observes that there were about ten different heads of qualification enumerated in the statute to which proof might be applied, and, according to the argument made, every person who laid an information as to qualification of the accused would be bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. "The argument," the eminent jurist remarks, "really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be in-

sufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the [fol. 19] qualifications, will be well defended? Is not the statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law, the proof of which is easy on the one side, but impossible on the other?"

The great jurist makes reference to Lord Mansfield in Spiers v. Parker, and states that he finds him laying down the rule that in actions upon the game laws, and he saw no good reason why the rule should not be applied to informations as well as actions, the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. Continuing he said:

"The same was said by Heath, J., in Jelfs v. Ballard; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of the opinion that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute is sufficient, without going on to negative, by the evidence, those qualifications."

Bayley, J., in a concurring opinion, said that no hardship was cast upon the defendant by the above rule because the defendant must be presumed to know his own qualification and to be able to prove it.

Holrod, J., concurring, said that it was a general rule that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. He holds that where it is shown that qualification to exercise a right or privilege is peculiarly within the knowledge of the person assuming to exercise the same, the burden is on such person to prove it.

It will be observed that the rule thus early recognized was not confined to medical cases, but to all of that class of cases in which the qualification of the person to exercise a privilege was the issue. The question before us is one in which qualification is the crux of the proposition. The books are replete with decisions which follow the rule early announced by Chief Justice Ellenborough and concurred

in by his associates. Justice Story, in United States v. Hayward, 26 Fed. Cas. 240 (No. 15,336), recognized the rule at length in a case wherein the question arose as to the necessity of negativing the neutrality of a vessel in which goods were brought into this country. In his consideration of negative allegations he holds the reasonable rule is that [fol. 20] the burden of proof shall rest upon the party who holds the affirmative, and especially where the facts are peculiarly within his privity and cognizance. In Casey v. United States, 276 U. S. 413, 72 L. Ed. 632, 48 Sup. Ct. Rep. 373, involving the illegal possession of morphine, Mr. Justice Holmes said:

"It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government." (1 Greenleaf on Evidence, sec. 79; 4 Wigmore on Evidence, sec. 2486; Yee Hem v. United States, 268 U. S. 178, 69 L. Ed. 904; Mobile etc. R. R. v. Turnipseed, 219 U. S. 35; State v. Miller, 182 Mo. 370; 81 S. W. 867; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; People v. Goscinsky, 52 Cal. App. 62; People v. T. Wah Hing, 47 Cal. App. 327.)

The question of corpus delicti and compelling the accused to be a witness against himself are fully discussed in a number of the cases cited in People v. Osaki, supra, and it is held that no right of the accused is denied or abridged by the application of the rule of convenience in cases where qualification is made the test of the right to enjoy a certain privilege, and the qualification upon which he asserts his right is peculiarly within the knowledge of the person exercising such privilege.

People v. Velasquez, 70 Cal. App. 362, 233 Pac. 359, Curtis, J., writing the opinion, held contrary to People v. Quarez, supra, and we are of the view that the treatment of and the application of the rule of convenience made by the District Court of Appeal is sound and in reason and is sustained by the greater weight of authority. It held that the accused had absolute knowledge as to whether he was a naturalized citizen, and the burden was on him to offer his proof. If the People in this case should be required to prove the negative the enforcement of the law

would be defeated by imposing upon the People the impossible task of making a thorough and painstaking search of the entire United States and its dependencies in probably a vain effort to establish the non-existence of a naturalization record. This case was published about the time that the Quarez decision was rendered. The first legislature that convened after the Quarez decision became the law, in an effort to supply the ground upon which a contrary decision might rest, adopted the amendment and statutes now before us, casting the burden of proof upon persons whose rights to exercise certain privileges granted only to citizens may be challenged upon the grounds of alienage as in said stat- [fol. 21] utes provided.

That it is competent for the state in the exercise of its sovereign power to reserve the ownership, occupancy and control of its agricultural lands for the benefit of its citizens or those eligible to become such, and that it may as a means of determining such eligibility when it is drawn into question by an appropriate proceeding cast upon the person claiming or assuming the right to own, occupy or control said land, the burden of proving his eligibility, are propositions that are entrenched in reason and supported by the great weight of eminent authority, and cannot be seriously questioned.

Medical license cases and liquor cases furnish a fertile field for the application of the rule of convenience or necessity. But it will be found upon an examination of the cases that the rule has been applied to cases of bigamy, relationships, the right to take game, possession of opium, questions of neutrality, and in fact generally to all cases of qualification where the right to enjoy a privilege is peculiarly within the knowledge of the person exercising such privilege, and not within the knowledge of the state which challenges the right by negative allegations. No case can easily be imagined which so aptly justifies the application of the rule of necessity and convenience as do the facts and circumstances which constitute the basis of the instant case. It would be beyond reason to require the state to search the records of every city, parish and county of the nation in proof of a negative when the question of qualification is peculiarly within the knowledge of the person who asserts the right to enjoy a privilege which attaches to citizenship alone.

We have given no special consideration to section 9b of said amendment to the Alien Land Act, for the dual reason that it is not material to the issue involved in the instant case, and its effect was fully considered in the Osaki case. That section provides that when the proof shows the defendant to be a member of a race ineligible to citizenship under the naturalization laws of the United States, the burden of proving citizenship or eligibility as a defense shall thereupon devolve upon such defendant. It is specially provided by said section that it shall not modify, limit or affect in any manner the provisions of said section 9a. Said section 9b was doubtless adopted as a measure offering some assistance in the way of making the act effective if section 9a should for any reason fail.

In the prosecution of cases of this class the burden of [fol. 22] proof is upon the prosecution to affirmatively establish every element constituting the offense, save the want of eligibility on the part of the accused. There is nothing unreasonable or unjust in the rule which requires the accused to prove his eligibility. The legislature has determined that the safety and welfare of the state depend largely upon the ownership of its agricultural land remaining in the hands of its citizens, or those eligible to become such. The United States Supreme Court in a number of decisions has approved this policy. The legislature by statutory enactment has cast the burden upon those whose eligibility is challenged in the name of state of proving such eligibility. It is entirely competent for it to do so.

Judgment affirmed.

Seawell, J.

We concur:

Tyler, J., pro Tem. Langdon, J. Waste, C. J.

IN SUPREME COURT OF CALIFORNIA

DISSENTING OPINION

I dissent. The crime charged against the defendants consists of two elements, (1) the alienage and ineligibility to citizenship of H. Doi, and (2) the possession of agricultural lands by said defendants. The second of these

two elements was proven, but there was no evidence whatever in support of the first element—alienage and ineligibility to citizenship of H. Doi. Under section 9a of the Alien Land Act as the alienage and ineligibility to citizenship was alleged in the indictment the burden of proving citizenship or eligibility to citizenship was cast upon the defendants. The conviction of the defendants must stand, therefore, if this section of the Alien Land Act is a valid exercise of legislative power. The majority opinion sustains the validity of the law in question. In the first place it is apparent that there is a marked distinction between the instant case and the case of People v. Osaki, 209 Cal. 169. In that case there was direct proof, and this fact was emphasized throughout the opinion, not only that the defendant Osaki was in the possession of agricultural lands, but also that he was a member of the Japanese race. Under section 9b of the Alien Land Act proof of these facts creates "a prima facie presumption of ineligibility to citizenship." [fol. 23] The constitutionality of section 9a of said act is not questioned. Under that section it is necessary to prove two facts: First, that the defendant is in possession of agricultural lands of this state, and second, that he is a member of a race ineligible to citizenship. Under section 9a, however, only one of these facts is required to be proven, and that is that the defendant is in possession of agricultural lands of this state. From this one fact under said section the presumption may be drawn that the defendant is a member of a race ineligible to citizenship and that he is also ineligible to citizenship. Referring back to section 9b of the act and the legislative presumption therein created, we find that upon proof that the defendant is a member of a race ineligible to citizenship, the presumption arises that he is ineligible to citizenship. It is clear that there is a reasonable and rational connection between the fact thus proven and the fact presumed. It is reasonably probable that a member of the Japanse race, for instance, was born in Japan and is, therefore, ineligible to citizenship under the laws of this country. But under section 9a of the act, the only fact necessary to prove is that the defendant is in possession of agricultural lands and the burden of proving that he is ineligible

to citizenship is then cast upon the defendant, or which amounts to the same thing, the defendant is then presumed to be ineligible to citizenship. From the foregoing statement, I think it clearly appears that there is no rational or reasonable connection or relation between the fact proven and the fact presumed. The fact that a person is in possession of agricultural lands of the state does not in the least tend to prove that he is a member of any particular race, much less of a race, the members of which are denied citizenship under our laws. The validity of legislation creating presumptions similar to that provided for by section 9a of said act has frequently been before the courts of this and other jurisdictions with the result that it has uniformly been declared invalid. One of the leading cases upon this subject is that of McFarland v. American Sugar Refining Co., 241 U. S. 79. In that case the legislature of Louisiana had enacted a statute which purported to impose penalties for monopolies and conspiracy in relation to trade. By this statute it was provided that: "Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restaint of trade and commerce, and upon conviction thereof shall be subject to a fine. * * *" The Supreme Court of the United States held that this presumption was invalid as being in violation of the Fourteenth Amendment to the Constitution, and speaking through Mr. Justice Holmes said:

[fol. 24] "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate'. (Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.) The presumption created here has no relation in experience to general facts."

In O'Neill v. United States, 19 Fed. (2d) 322, the defendant was accused with violation of the Harrison Anti-

Narcotic Act. In that case the defendant was convicted of the offense of selling drugs without paying the special tax provided by the statute. The prosecution relied upon the prima facie presumption which was claimed to arise under the statute from the possession of unstamped drugs. In discussing this presumption, the court said:

"The general principle is well recognized that even in criminal prosecutions, congress or a state legislature may with certain limitations enact that when certain facts have been proved they shall be prima facie evidence of the existence of the main fact in question. (12 C. J., p. 823, sec. 285.) The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other facts must not be so unreasonable or unnatural as to be a purely arbitrary mandate. * * *"

Further on in the opinion, the court also said:

"In our opinion, congress could not reasonably enact that possession of unstamped narcotic drugs should be prima facie evidence of a violation of the first penal provision of section 1."

In the case of Simpkins v. State, 249 Pac. 168, the court had under consideration a statute of Oklahoma providing that if a person driving an automobile had on or about his person any intoxicating liquors that fact would constitute prima facie evidence of such person having driven while intoxicated. After discussing the constitutional limitations as to legislation of that character the court said:

[fol. 25] "It is apparent that the presumption here created violates this limitation, since, in order to draw the conclusion of intoxication from the fact of a driver of an automobile having intoxicating liquors on his person or in said vehicle, there must first be the inference that the driver had used the intoxicants, and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. The presumption of intoxication fixed by the statute is also contrary to the fundamental requirement that the inference or presumption of intoxication arising from the possession of

the person or in the vehicle of liquors must be a probable or natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote."

To the same effect are two recent decisions of the Supreme Court of the United States: Manley v. Georgia, 279 U. S. 1, where the court held unconstitutional a statute of Georgia which allowed a conviction of fraud upon mere proof of insolvency, on the ground that the statutory presumption was not rational and that the connection between the fact proved and that presumed was not rational; and Western & Atlantic Railroad v. Henderson, 279 U. S. 639, holding unconstitutional a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision upon the ground that a statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary and irrational.

Many other authorities to the same effect might be cited but we deem the above sufficient for our present purpose. These cases uniformly hold that in order to sustain such a legislative presumption as that created by section 9a of said act, it is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed. In the present case there is no semblance of such a connection. The mere fact that a defendant is brought into court and proof is made that he is using or is in possession of real property susceptible of producing agricultural products is made the basis of a presumption that he is an alien ineligble to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship. In at least some of the cases cited there may be said to be some connection, though slight, between the fact proven and the fact presumed. For instance, in the case of the driver of an automobile with intoxicating liquor [fol. 26] in his possession, it might well be said that there is some slight although rather shadowy connection between the fact that the accused had intoxicating liquor in his possession and the fact of his intoxication, yet the court held such legislative presumption to be invalid. But in the case before us there is not the slightest connection or relation-

ship between possession of real property and the alienage or citizenship of the person in its possession. According to the unbroken line of authorities, a presumption created by a statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power. (State v. Lapointe, 81 N. H. 227, 123 Atl. 692.)

Curtis, J.

We concur:

Shenk, J. Preston, J.

[fol. 26½] [File endorsement omitted]

[fol. 27] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION OF APPELLANTS THAT SUPREME COURT HEAR AND DETERMINE CAUSE AFTER DECISION BY DISTRICT COURT OF APPEAL

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the State of California:

The appellants respectfully petition that your Honorable Court grant a hearing and determination of the above entitled cause after decision rendered therein by the District Court of Appeal in and for the Fourth Appellate District and base said request upon the grounds hereinafter set forth:

First, that section 9a of the Alien Land Act (Stats. 1927, p. 880) deprives these appellants and each of them of liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution of the [fol. 28] United States.

Second, that section 1983 of the C. C. P. (Stats. 1927, p. 434) deprives these appellants and each of them of liberty and property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

Third, that the judgment of the District Court of Appeal, Fourth Appellate District, as announced in its opinion on file, a copy of which is attached hereto, deprives these ap-

pellants and each of them of the equal protection of the laws by imposing a heavier burden on persons accused of violating the Alien Land Act, particularly if they appear to be of a race ineligible to citizenship than upon other persons accused of any crime which is malum in se or of any other crime which is malum prohibitum and also by imposing a heavier burden upon persons of Oriental race than upon persons who speak other languages, or are of other races, each and all of such distinctions having no reasonable or just basis and constituting therefore a denial of the due process of law and the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Fourth, that it is necessary that this rehearing be granted to settle important questions of law.

[fol. 29] In support of each of the foregoing grounds, we respectfully submit the following points upon which appellants rely. Attached hereto is a copy of the opinion — Honorable District Court of Appeal.

Points Upon Which Appellants Rely

All of the evidence introduced in this case consists of a stipulation which is set forth in the opinion of the Honorable District Court of Appeal. Said Court, basing its decision on the case of People v. Ozaki, 209 Cal. 169, decided that Section 9a of the Alien Land Act was constitutional. We did not feel that the Ozaki decision, although rendered by this Honorable Court, was with the weight of authorities, and therefore petitioned for re-hearing before the District Court of Appeal Fourth Appellate District, and said petition having been denied, this petition was brought for the purpose of presenting it again to this Honorable Court, having in view to present the matter to the United States Supreme Court, with this court's consent if this court follows its former decision, viz: People v. Ozaki, 209 Cal. 169.

We will devote very little time in this petition to going over the authorities, which we think should have been followed by this court at the time of the Ozaki decision. How-
[fol. 30] ever, assuming that this court carefully considered these cases it will not be necessary to again urge them.

The Ozaki case, 209 Cal. 169, is professedly based upon the presumption that the rule of convenience applies to the

instant case merely because the facts are difficult to prove and are within the knowledge of defendant.

None of the cases cited in that opinion go that far. In our opinion they all appear to be cases involving exceptions, or license or defenses by way of mitigation. If the Ozaki case is allowed to stand it seems to us that every criminal statute can likewise be construed and proof of almost any element of any crime may be dispensed with, if only the defendant knows the facts and if they are difficult to prove. It follows that if the opinion is correct in its statement of principle, every person may be presumptively guilty of almost every crime, subject, however, to his right to prove he is not guilty. The opinion indicates, however, that the rule cannot be applied to any crime malum in se or to any other crime malum prohibitum. The decision seems to be that the burden of proving the nativity and citizenship of the defendant may be cast on him because these facts are peculiarly within his knowledge. On this ground it is sought to excuse the state from proving [fol. 31] part of the corpus delicti.

The Ozaki case in effect overruled several decisions of the Supreme Court, viz: People v. Quarez, 196 Cal. 404; and People v. Fray, 165 Cal. 140. By overruling the Quarez case and the Fray case a dangerous precedent was established, as apparently there is no limit to which the legislature may go in shifting the burden of proof in criminal cases upon the defendant to prove his innocence rather than upon the state to prove his guilt.

In other words, the Ozaki case seems to have taken away from the defendants the guard of "due process of law" which has been with the defendants ever since the adoption of the Fourteenth Amendment to the Constitution of the United States.

It is well settled law that the legislature has no constitutional power to provide that in a criminal case a presumption adverse to the defendant shall arise from the proof of other facts unless there is a reasonable connection between the fact proved and the inference which the statute directs be drawn therefrom. This principle seems to be sustained in the following cases: McFarland v. American Sugar Refining Co., 241 U. S. 79; Bailey v. State of Alabama, 219 U. S. 219; Brightman v. U. S., 7 Fed. 2d, [fol. 32] 532; O'Neill v. U. S., 19 Fed. 2d, 322.

Unless there is a connection between the fact proved and the inference, which connection is based upon reason and supported by evidence, the statute is unconstitutional. In the present case there is no semblance of any such connection. The mere fact that a defendant is brought into court and that he has used or enjoyed real property is made the basis of a presumption that he is an alien ineligible to citizenship. There is no possibility of any rational claim that the possession of land by a defendant gives rise to any inference one way or the other as to whether he is a citizen or alien, nor as to whether he is an alien who is eligible to citizenship or one who is not so eligible. We still feel that Section 9a violates due process of law and the equal protection of the laws. We have not cited cases or many authorities, nor argued this petition as strenuously as we perhaps should, but we feel that all of the cases on this subject were carefully considered by this court in the case of People v. Ozaki, 209 Cal. 169, and that this court is not apt to change its views rendered in that decision. However, we do intent to have this question, as well as the question relating to Section 9b presented to the United States Supreme Court with the consent of this court, and it is necessary to ask for this re-[fol. 33] hearing in order to be able to make our way to the United States Supreme Court.

However, we wish this court to know that we are sincere in our statement that the Okaki case should not be permitted to stand without having it presented to the United States Supreme Court for its views.

Respectfully submitted.

J. Marion Wright, Attorney for Appellants.

[fol. 34] Fourth Appellate District, August 5, 1932

Crim. No. 232

The People of the State of California, Plaintiff and Respondent,

v.

George Morrison and H. Doi, Defendants and Appellants

(1) Alien Land Law—Evidence—Presumptions—Burden of Proof—Constitutional Law—Equal Protection.—Section

1983 of the Code of Civil Procedure as adopted in 1927 and section 9a of the Alien Land Law (Stats. 1927, p. 881), relating to the presumption of alienage and ineligibility to citizenship and to the burden of proof thereof, are not unconstitutional as violating the due process clause of the 14th amendment to the federal Constitution.

Appeal by defendants from a judgment of the Superior Court of San Diego County, A. C. Finney, Judge, of conviction of conspiracy to violate the Alien Land Act and from an order denying a new trial.

Affirmed.

For Appellants: J. Marion Wright.

For Respondent: U. S. Webb, Attorney-General, and James S. Howie, Deputy Attorney-General.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of this state. (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881.) The indictment alleged that the defendants willfully, unlawfully and feloniously combined and conspired by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes, by the defendant Doi and for his use and benefit, of certain described real property situated in the county of San Diego, which real property is alleged to be agricultural in character. It is alleged that the defendant Doi was and is an [fol. 35] alien ineligible to citizenship under the laws of the United States, and that he is a citizen and subject of the empire of Japan and not authorized by law or treaty to acquire, enjoy, occupy or to have any beneficial interest in any real property in this state for agricultural purposes. It is also alleged that in furtherance of said conspiracy and for the purpose of accomplishing and effecting the purposes and objects thereof, the defendant Morrison put the defendant Doi into possession of the agricultural land described, and permitted, aided and encouraged him to take possession thereof and to use, enjoy, cultivate and occupy the same, and that the defendant Doi took possession of said land, used, enjoyed, cultivated and occupied the same and

raised and harvested crops thereon for his own use and benefit.

Trial by jury was waived and the action was tried before the court. The only evidence introduced consisted of the following stipulation: "It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate [fol. 36] and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

The defendants were found guilty and released on probation. This appeal is from the judgment and from an order denying a motion for a new trial.

(1) The only point raised is that section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927, p. 881), and section 1983 of the Code of Civil Procedure, also adopted in 1927, are unconstitutional as violating the due process of law clause of the 14th amendment to the Constitution of the [fol. 37] United States.

Section 9a of this act, thus attacked, reads as follows:

"In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

Section 1983 of the Code of Civil Procedure need not be here quoted, but in brief and so far as here material, it provides that the burden of proving his citizenship or eligibility to citizenship shall rest upon a defendant in such a case as this, when it is alleged that a right or privilege forbidden by the Alien Land Act has been exercised by the defendant and that he is not a citizen of the United States and not eligible to become such a citizen, and when it has been established that the defendant in question has exercised such a forbidden right or privilege.

This case is presented as being one in all respects similar to the case of People v. Ozaki, 209 Cal. 169, with the exception that this action relates only to the validity of section 9a of this act. The only argument made is to the effect that the decision in the case just mentioned is erroneous. [fol. 38] In the case before us there is neither evidence as to the nationality or race of the defendant Doi nor evidence that he was an alien ineligible to citizenship. To that extent this case may differ from the case of People v. Ozaki, as the court there pointed out that the defendant therein was apparently conceded by his counsel to be of the Japanese race, and in passing upon a certain instruction, the court remarked that the case was apparently tried on the theory that the defendant was of alien, ineligible blood. However, in passing upon the main question there involved, as to whether the 1927 amendments to the Alien Land Act were unconstitutional as violating the due process clause of the state and federal Constitutions, the court said:

"No evidence was offered by either side pointedly directed to the citizenship of said alleged alien. If the Alien

Land Acts, which cast upon said alleged alien the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of this country as a prerequisite to the enjoyment of the rights which the evidence shows he undoubtedly exercised, are not in conflict with the due process provisions of the state and federal Constitutions, the judgments of conviction must stand."

The question thus stated is the same question now raised in this case, although here limited to section 9a of this act. While the court in the case just referred to considered sections 9a and 9b together, it discussed the question now before us at considerable length and, as we take it, arrived at the conclusion that neither section 9a nor section 9b of [fol. 39] this act is in conflict with the due process clause of the Constitution.

We regard the decision in the case referred to as controlling in the instant case, and upon that authority the judgment and order appealed from are affirmed.

Barnard, P. J.

We concur.

Marks, J. Jennings, J.

[fol. 40] IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER GRANTING PETITION FOR HEARING—Filed Sept. 2, 1932

By the COURT:

The Appellants' petition to have the above entitled cause heard and determined by this Court after judgment in the District Court of Appeal of the Appellate District is granted and said cause transferred to this Court for hearing and decision.

Dated this 1st day of September, 1932.

Waste, Chief Justice. Seawell, Justice. Tyler, J., p. t. Curtis, Justice. Preston, Justice. Langdon, Deputy, D., Atty. for Respondent.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fols. 41 & 42] Bond on appeal for $500.00, approved and filed Aug. 11, 1933, omitted in printing.

[fol. 43] [File endorsement omitted]

Received copy Aug. 11, 1933.
U. S. Webb, Atty. General, by Frank English, Deputy, D., Atty. for Respondents.

[fol. 44] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 11, 1933

The petition of George Morrison and H. Doi, appellants herein, respectfully represents:

I

That appellants, conceiving themselves aggrieved by the judgment herein, and the decision of the Supreme Court of the State of California, heretofore rendered on June 1, 1933, sustaining and affirming the judgment of conviction against appellants in a criminal action lately pending in the Superior Court in and for the County of San Diego, State of California, for the reasons specified in the assignments of error filed herewith, desire to appeal from said judgment, and desire that said appeal returnable to the Supreme [fol. 45] Court of the United States, shall act as a supersedeas and suspend during the pendency of said appeal, the effect of said judgment.

Your petitioners further represent that the judgment and decision of the said Supreme Court of the State of California, rendered as aforesaid, is a decision where is drawn in question the validity of the statutes or authorities exercised under the statutes of the State of California, on the ground of their being repugnant to the Constitution, or laws of the United States, and the decision herein is in favor of their validity.

Wherefore, petitioners pray that said appeal may be allowed, that said appeal may operate as a supersedeas and

suspend, during the pendency of said appeal, the effect of the judgment rendered herein;

That said appeal be made returnable to the Supreme Court of the United States, according to law, and that a transcript of the records, proceedings, papers and exhibits upon which said judgment was rendered, duly authenticated, be sent to the Supreme Court of the United States.

J. Marion Wright, Attorney for Appellants, Citizens National Bank Building, Los Angeles, California.

[fol. 46] [File endorsement omitted]

Received copy. Aug. 11, 1933.

U. S. Webb, Attorney General, by Frank English, Deputy, D., Atty. for Respondent.

[fol. 47] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Aug. 11, 1933

Come now George Morrison and H. Doi, appellants in the above entitled cause, and respectfully submit that in the record, proceedings, decision and final judgment of the Supreme Court of the State of California in the above entitled matter there is manifest error in this, to wit:

I

That the Court erred in holding that Section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure of the State of California, also adopted in 1927, were constitutional, and do not violate the Fourteenth Amendment to the Constitution of the United States.

[fol. 48] II

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, were constitutional, and do not violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

III

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States and of the State of California, of rights, privileges and immunities secured to the citizens of the United States by the Federal Constitution.

IV

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States of liberty and property without due process of law.

V

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, [fol. 49] also adopted in 1927, did not deprive and deny to appellants and certain citizens and persons within the jurisdiction of the State of California the equal protection of the law.

VI

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which provide that in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of said Act, when the proof introduced by the State, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property, or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment, or information, alleges the alienage and ineligibility to United States citizenship of said defendant, the burden of proving citizenship or eligibility to citizenship shall there-

upon devolve upon the defendant, are not in conflict with the due process — law provisions of the Constitution of the United States and the Constitution of the State of California.

VII

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 [fol. 50] p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, without requiring any proof whatsoever to be first made by the State or the people, and solely by reason of an allegation in the indictment alleging the ineligibility to United States citizenship of said defendant, are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

VIII

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States as a prerequisite to the enjoyment and occupation, or a beneficial interest in real estate in California, for agricultural purposes, are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

IX

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 [fol. 51] p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, or statutes of the State of California, placing upon appellant H. Doi the burden of showing he is a citizen of the United States by birth or by naturalization, solely by reason of the allegation of his ineligibility to citizenship in the indictment, without any proof of any kind as to his citizenship or ineligibility to become a

citizen, do not violate the due process clause and Section 13, Article I of the Constitution of California, and are not discriminatory or in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

X

The Court erred in applying to the case the so-called "rule of evidence", that is, the rule that when the negative of the issue does not readily permit direct proof or where the facts come more immediately within the knowledge of the defendants, the onus probandi rested upon the appellants.

XI

The Court erred in holding that the burden of showing that appellant, H. Doi, was a citizen of the United States or eligible to become a citizen, a fact that was part of the corpus delicti and must be proven before a conviction could be had, was not upon the prosecution or appellee, but was upon the appellant.

[fol. 52]

XII

The Court erred in holding that under Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, there was a rational connection between the facts proved and the ultimate facts presumed.

XIII

The Court erred in holding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not, by casting upon appellant the burden of proving citizenship or eligibility to citizenship, compel said appellant, H. Doi, to be a witness against himself.

XIV

The Court erred in holding and deciding that appellant, H. Doi, solely by reason of the allegation in the indict-

ment that he was an alien, ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural property, was required to prove that he was a citizen either by birth or naturalization.

XV

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, should cast upon appellant H. Doi the [fol. 53] burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, as a prerequisite to the enjoyment and occupation of or a beneficial interest in real estate in California, for agricultural purposes, are not discriminatory and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XVI

The Court erred in holding that Section 9a of the Alien Land Act (Stats. 1927 p. 881) establishes a "rule of evidence".

XVII

The Court erred in deciding there was a natural and rational evidentuary relation between the facts proved and those presumed under Section 9a of the Alien Land Act.

XVIII

The Court erred in holding that the provisions of Section 9a of the Alien Land Act (Stats. 1927 p. 881), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the State, under the provisions of such Act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or interest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are [fol. 54] valid, and the enactment of such section was a valid exercise of the power of the Legislature.

XIX

The Court erred in holding that the Legislature by statutory enactment has cast the burden upon those whose eligibility is challenged, in the name of the State, of proving such eligibility.

XX

The Court erred in ordering judgment to be entered affirming the judgment of the Superior Court of San Diego —, California, after judgment in District Court of Appeal, Fourth District (70 Cal. App. Dec. 488).

J. Marion Wright, Attorney for Appellants, Citizens National Bank Building, Los Angeles, California.

[fol. 55] [File endorsement omitted]

Received copy Aug. 11, 1933.
U. S. Webb, Attorney General, by Frank English, Deputy, D., Atty. for Respondent.

[fol. 56] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRAYER FOR REVERSAL—Filed Aug. 11, 1933

Now come George Morrison and H. Doi, appellants herein, and pray for a reversal of the judgment and decision of the Supreme Court of the State of California, in the action brought by the People of the State of California as plaintiff, against George Morrison and H. Doi as defendants, and appellants herein, which judgment was entered in the office of the Clerk of the Superior Court of San Diego County, State of California, on or about April 1, 1932, and they also pray for a reversal of the order of affirmance and judgment in said action of the Supreme Court of the State of California, entered in the office of the Clerk of said Court on June 1, 1933.

J. Marion Wright, Attorney for Appellants, Citizens National Bank Building, Los Angeles, California.

[fols. 57–59] Citation, in usual form, showing service on U. S. Webb, filed Aug. 11, 1933, omitted in printing.

[fol. 60] [File endorsement omitted]

Received copy Aug. 11, 1933.
U. S. Webb, Attorney General, by Frank English, Deputy, D., Atty. for Respondent.

[fol. 61] IN SUPREME COURT OF CALIFORNIA

Crim. 3601

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,

vs.

GEORGE MORRISON and H. DOI, Defendants and Appellants

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed Aug. 11, 1933

The above cause coming on to be heard, pending the petition of George Morrison and H. Doi for appeal, and the assignments of error to the Supreme Court of the United States, from the final judgment made and entered herein on the 1st day of June, 1933;

It is ordered that the appeal to the Supreme Court of the United States be and the same is hereby allowed; and

It is further ordered that this appeal shall operate to suspend and stay the fulfillment of said judgment rendered herein, until the determination of said appeal.

Emmett Seawell, Acting Chief Justice of the Supreme Court of the State of California.

[fol. 62] [File endorsement omitted]

Received copy of within præcipe August 11th, 1933.
U. S. Webb, Attorney General, by Frank English, Deputy, D., Atty. for Respondent.

[fol. 63] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed Aug. 11, 1933

To the Clerk of the above entitled Court:

You are requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above entitled cause, and to include in such transcript of record the following papers and exhibits, to wit:

1. Amended indictment for conspiracy;
2. Demurrer to amended indictment and ruling thereon;
3. Pleas of the defendants;
4. Stipulation constituting all the evidence in the case;
5. Judgment of the Court;
6. Motion for a new trial and order denying motion for a new trial;

[fol. 64] 7. Notice of appeal;

8. Decision of the Supreme Court of the State of Californit, dated June 1, 1933;
9. Petition for appeal to the Supreme Court of the United States;
10. Assignments of error on appeal to the Supreme Court of the United States;
11. Prayer for reversal, to the Supreme Court of the United States;
12. Citation, to the Supreme Court of the United States;
13. Statement of grounds of jurisdiction;
14. Order allowing appeal;
15. This præcipe.
16. Petition for rehearing to Supreme Court of California from decision of District Court of Appeal, 4th District.
17. Order granting rehearing.
18. Copy of cost bond on appeal.
19. Proof of service of copies of papers on appeal on attorney for appellee, and calling attention to Rule 12, par. 3, Rules of Supreme Court of United States.

J. Marion Wright, Attorney for Appellants.

[fol. 65] [File endorsement omitted]

[fol. 66] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PRÆCIPE OF PLAINTIFF AND RESPONDENT REQUESTING AMENDED COPY OF SECTION 9a OF THE ALIEN LAND ACT OF THE STATE OF CALIFORNIA (STATUTES OF CALIFORNIA 1927, p. 880) AND OF SECTION 1983 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA (STATUTES OF CALIFORNIA 1927, p. 434)—Filed Sept. 5, 1933

To the Clerk of the above entitled Court:

You are requested by the above plaintiff and respondent to make a transcript of record to be filed in the Supreme Court of the United States, indicating an additional portion of the record in the above entitled case, to-wit, amendments to the quotations found in the statement of grounds of jurisdiction disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question in the above entitled matter, which quotations are with reference to Section 9a of the Alien Land Act of the State of California (Statutes of California 1927, page 880), and [fol. 67] with reference to Section 1983 of the Code of Civil Procedure of the State of California (Statutes of California 1927, page 434).

The purpose of this request is to have of record in the United States Supreme Court a full, true and correct copy of the above described provisions in the Statutes of the State of California. Said full, true and correct copy of said statutory provisions which are herein requested in the matter of the appeal to the United States Supreme Court, heretofore allowed in the above entitled case, are as follows:

Section 9a of the Alien Land Act of the State of California (Statutes of California 1927, page 880):

"Sec. 9a. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof

by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship [fol. 68] shall thereupon devolve upon such defendant."

Section 1983 of the Code of Civil Procedure of the State of California 1927 (page 434):

"Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by [fol. 69] the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

U. S. Webb, Attorney General of the State of California; Frank English, Deputy Attorney General; James S. Howie, Deputy Attorney General, Attorneys for Plaintiff and Respondent.

[fol. 70] Crim. No. 3601

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff & Respondent,

vs.

GEORGE MORRISON and H. DOI, Defendants and Appellants.

Affidavit of Service by Mail

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

The undersigned, being duly sworn, says: I am a citizen of the United States, over the age of eighteen years, a resident of the City and County of San Francisco, State of California, and not a party to the above entitled action; J. Marion Wright, the attorney of record of the above-named Defendants and Appellants, maintains an office at Citizens National Bank Bldg., in Los Angeles, County of Los Angeles, State of California, and between said two places there is a regular communication by mail; on the 21st day of August, 1933, I served a true copy of the Præcipe herein, to the original of which this affidavit is attached, on said last-named attorney of record, by depositing said copy on said date in the post office at the said City and County of San Francisco, enclosed in a sealed envelope addressed to said attorney at the office thereof, and prepaying the postage thereon.

Marguerite Gallagher.

Subscribed and sworn to before me this 21st day of August, 1933. Leonee Browne, Deputy Attorney General.

[fol. 71] [File endorsement omitted]

[fol. 72] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

AFFIDAVIT FOR ORDER ENLARGING TIME—Filed Sept. 18, 1933

STATE OF CALIFORNIA,
County of Los Angeles, ss:

J. Marion Wright, being first duly sworn, says: That he is attorney for the appellants in the above-entitled action.

That the return day fixed by the court for the filing of the record of this case with the clerk of the United States Supreme Court is September 20, 1933. That the clerk of the Supreme Court of California has not yet completed the record so that the same can be docketed with the clerk of the United States Supreme Court by or before said return day. That the clerk of said Supreme Court of California has requested that affiant secure an additional thirty days' time in order to give him time to prepare and file said record with the clerk of the United States Supreme Court. That it is necessary that an extension of time be had for the said clerk to complete said record so that it may be [fol. 73] properly docketed with the clerk of the United States Supreme Court. That it is necessary that the time be extended from September 20, 1933, to October 20, 1933.

Wherefore affiant prays for an order enlarging the time for the docketing of said case and the filing of the record thereof in the United States Supreme Court.

J. Marion Wright.

Subscribed and sworn to before me this 13th day of Sept. 1933. J. M. Clark, Notary Public in and for the County of Los Angeles, State of California. (Seal of J. M. Clark, Notary Public, Los Angeles Co., Cal.)

[fol. 74] [File endorsement omitted]

[fol. 75] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

ORDER ENLARGING TIME TO DOCKET CASE AND FILE RECORD THEREOF WITH CLERK OF THE UNITED STATES SUPREME COURT—Filed Sept. 18, 1933

Upon reading and filing the affidavit of J. Marion Wright, attorney for appellants, and good cause being shown, time for appellants to docket the above entitled cause and file the record thereof with the clerk of the United States Supreme Court, is hereby enlarged and extended from September 20, 1933 to and including October 20, 1933.

Dated September 14, 1933.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 76–79] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 80 & 81] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF THE POINTS ON WHICH APPELLANTS RELY AND OF PARTS OF THE RECORD WHICH THEY THINK NECESSARY FOR THE CONSIDERATION THEREOF—Filed Sept. 27, 1933

Come now appellants and respectfully make the following statement of the points on which they intend to rely and of the parts of the record which they think necessary for the consideration thereof:

Point I

That Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, purporting to cast upon the defendant H. Doi the burden of proving he was a citizen of the United States or eligible to become one, where no proof whatsoever was introduced as to his citizenship or ineligibility to citizenship, but the indictment alleged that he was ineligible to citizenship, is unconstitutional and void, [fol. 82] being discriminatory and in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and as violating the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and as violating Section 13, Article I of the Constitution of the State of California.

Point II

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927 p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, or statutes of the state of California, placing upon appellant H. Doi the burden of showing he is a citizen of the United States by birth or by naturalization, solely by reason of the allegation of his ineligibility to citizenship in the indictment, without any proof of any kind as to his citizenship or ineligibility to become a citizen, do not violate the due process clause and Section 13, Article I of the Constitution of California, and are not discrimina-

tory or in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Point III

The court erred in holding and deciding that appellant H. Doi, solely by reason of the allegation in the indictment that he was an alien, ineligible to citizenship, and the intro- [fol. 83] duction of proof that he had the enjoyment, use, cultivation and occupation of agricultural property, was required to prove that he was a citizen either by birth or naturalization.

Point IV

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, without requiring any proof whatsoever to be first made by the State or the people, and solely by reason of an allegation in the indictment alleging the ineligibility to United States citizenship of said defendant, are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the state of California.

Point V

The court erred in holding that under Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, there was a rational connection between the facts proved and the ultimate facts presumed.

Point VI

The court erred in holding that the burden of showing that appellant H. Doi, was a citizen of the United States or [fol. 84] eligible to become a citizen, a fact that was part of the corpus delicti and must be proven before a conviction could be had, was not upon the prosecution or appellee, but was upon the appellant.

Point VII

The court erred in applying to the case the so-called "rule of evidence", that is, the rule that when the negative of the issue does not readily permit direct proof or where the facts come more immediately within the knowledge of the defendants, the onus probandi rested upon the appellants.

Point VIII

The court erred in holding that Section 9a of the Alien Land Act (Stats. 1927, p. 881) established a "rule of evidence".

Point IX

The court erred in deciding there was a natural and rational evidentuary relation between the facts proved and those presumed under Section 9a of the Alien Land Act.

Point X

The court erred in holding that the provisions of Section 9a of the Alien Land Act (Stats. 1927, p. 881), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the State, under the provisions of such Act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or in- [fol. 85] terest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are valid, and the enactment of such section was a valid exercise of the power of the legislature.

Point XI

The court erred in holding that Section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure also adopted in 1927, not, by casting upon appellant the burden of proving citizenship or eligibility to citizenship, compel said appellant H. Doi, to be a witness against himself.

Point XII

The court erred in holding that Section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927, p. 881) and Sec-

tion 1983 of the Code of Civil Procedure of the state of California, also adopted in 1927, were constitutional, and do not violate the Fourteenth Amendment to the Constitution of the United States.

Point XIII

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, were constitutional, and do not violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

[fol. 86] Point XIV

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States and of the state of California, of rights, privileges and immunities secured to the citizens of the United States by the Federal Constitution.

Point XV

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States of liberty and property without due process of law.

Point XVI

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive and deny to appellants and certain citizens and persons within the jurisdiction of the State of California the equal protection of the law.

Point XVII

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also

[fol. 87] adopted in 1927, which provide that in any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of said Act, when the proof introduced by the State or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property, or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such facts, and the complaint, indictment, or information, alleges the alienage and ineligibility to United States citizenship of said defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon the defendant, are not in conflict with the due process law provisions of the Constitution of the United States and the Constitution of the state of California.

Point XVIII

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant H. Doi the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States as a prerequisite to the enjoyment and occupation, or a beneficial interest in real estate in California, for agricultural purposes, are not in conflict with the due process of law provisions of the Constitution of the United States and [fol. 88] the constitution of the state of California.

Point XIX

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, should cast upon appellant H. Doi the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, as a prerequisite to the enjoyment and occupation of or a beneficial interest in real estate in California, for agricultural purposes, are not discriminatory and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Point XX

The court erred in holding that the legislature by statutory enactment has cast the burden upon those whose eligibility is challenged, in the name of the State, of proving such eligibility.

Point XXI

The court erred in ordering judgment to be entered affirming the judgment of the Superior Court of San Diego County, California, after judgment in District Court of Appeal, Fourth District (70 Cal. App. Dec. 488).

Point XXII

The court erred in holding that the provisions of Section 9a of the Alien Land Act (Stats. 1927, p. 880) placing the burden of proving citizenship or eligibility to citizen-[fol. 89] ship upon the defendants in any action, civil or criminal by the State under the provisions of such Act when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or interest therein by any defendant, and a complaint, indictment or information alleges the alienage and ineligibility to the United States citizenship of such defendant was valid, and the enactment of such section was a valid exercise of the power of the legislature.

Point XXIII

The court erred in holding that there was a rational or reasonable connection or relation between the fact proven, viz: that defendant H. Doi is in possession of agricultural lands, and the fact presumed, viz: that he is ineligible to citizenship.

Point XXIV

The court erred in holding that because the defendant is proven to be in possession of agricultural lands he is presumed to be a member of a race ineligible to citizenship.

Point XXV

There was no rational connection between the fact proved and the ultimate fact presumed. The inference that defendant H. Doi being in possession of agricultural lands

is an alien ineligible to citizenship, is unreasonable and unnatural, and purely arbitrary.

[fol. 90]

Point XXVI

The presumption created by Section 9a violates the limitation that there must be some rational connection between the fact proved and the ultimate fact presumed.

Point XXVII

The statutory presumption created by Section 9a is not rational and the connection between the fact proved and that presumed is not rational, and Section 9a is therefore unconstitutional.

Point XXVIII

It is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed. In the present case there is no semblance of such connection. The mere fact that a defendant is brought into court and proof is made that he is using or is in possession of real property susceptible of producing agricultural products, is made the basis of a presumption that he is an alien ineligible to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship.

Point XXIX

There is not the slightest connection or relationship between possession of real property and the alienage or citizenship of the person in its possession.

[fol. 91]

Point XXX

The presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power.

Parts of the Record Which Appellants Believe Necessary for the Consideration of This Appeal

Appellants believe necessary for the consideration of this appeal the entire record, with the exception of appellee's motion to the Supreme Court of the United States to

dismiss order by Supreme Court of California allowing appeal, and appellee's statement disclosing grounds making against the jurisdiction of the United States Supreme Court as asserted by appellants. The record desired is as follows:

1. Amended indictment for conspiracy;
2. Pleas of the defendants;
3. Stipulation constituting all the evidence in the case;
4. Judgment of the court as contained in the minutes of the court;
5. Motion for a new trial and order denying motion for a new trial;
6. Notice of appeal as contained in minutes of the court;
7. Decision of the Supreme Court of the state of California, dated June 1, 1933, including dissenting opinion;

[fol. 92] 7a. Petition for hearing in the Supreme Court after decision in District Court of Appeal, Fourth Appellate District, called in appellants' præcipe "Petition for Rehearing", to Supreme Court of California from decision of District Court of Appeal, Fourth Appellate District;

7b. Order of Supreme Court granting hearing, called in appellants' præcipe "Order granting Rehearing";

8. Appeal to the Supreme Court of the United States;
9. Assignments of error on appeal to the Supreme Court of the United States;
10. Prayer for reversal to the Supreme Court of the United States;
11. Citation to the Supreme Court of the United States;
12. Statement of the grounds of jurisdiction in full, including all authorities and decisions;
13. Amendment to statement of grounds of jurisdiction;
14. Order allowing appeal;
15. Appellants' præcipe;
16. Acceptance of service of copies of papers on appeal, and copy of notice calling attention to provisions of Rule 12, Paragraph 3, Rules of the Supreme Court of the United States.

Respectfully submitted.

J. Marion Wright, Attorney for Appellants.

[fol. 93] Received copy of the within statement, etc., this 22d day of September, 1933.

U. S. Webb, Attorney General, by James S. Howie, Deputy.

[fol. 94] [File endorsement omitted.]

Endorsed on cover: File No. 38,090. California Supreme Court. Term No. 487. George Morrison and H. Doi, appellants, vs. The People of the State of California. Filed September 27, 1933. File No. 487, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OF THE GROUNDS OF JURISDICTION, DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

Come now appellants and present the grounds of jurisdiction, disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question. The decision in question, of the Supreme Court of the State of California, upholding the validity of Section 9*a* of the Alien Land Act of the State of California, as adopted in 1927 (Stats. 1927, p. 881), and Section 1983 of the Code of Civil Procedure of the State of California, also adopted in 1927, and the hold-

ing that said Section 9*a* of said Alien Land Act is constitutional and is not discriminatory or in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and does not violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, or the provisions of the Constitution of the State of California, is erroneous; and the said decision and judgment of the court does violate the Constitution of the State of California, and the due process clause of the Fourteenth Amendment to the Constitution of the United States, and is discriminatory and in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The statutory provision believed to sustain the jurisdiction of this Court is the Fourteenth Amendment to the Constitution of the United States. The statute of the State of California which was held to be constitutional and valid, the validity of which is involved, is Section 9*a* of the Alien Land Act of the State of California, as adopted in 1927 (Stats. 1927, p. 881), being a portion of the Alien Land Act of the State of California (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881), and Section 1983 of the Code of Civil Procedure of the State of California, as adopted in 1927.

Section 9*a* of said Alien Land Act is as follows:

> "SEC. 9*a*. Citizenship must be proved by defendant. In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, *and the complaint, indictment or information alleges*

the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant." (Italics ours.)

Section 1983 of the Code of Civil Procedure is as follows:

"Proof of Citizenship.—Whenever in any action or proceeding, civil or criminal, brought by or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

Date of the Judgment Sought to Be Revewied and Date Upon Which Application for Appeal Was Presented.

The date of the judgment rendered by the Superior Court of the County of San Diego, State of California, is April 1, 1932. The judgment of the Supreme Court of the State of California, affirming said judgment of said Superior Court of San Diego County, was rendered and filed June 1, 1933, which is the judgment sought to be reviewed. The date upon which the application for this appeal is presented is August 10, 1933.

Nature of the Case.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of the State of California. (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881.) The indictment alleged that on or about the 27th day of August, 1931, defendants did wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, by unlawful means, to bring about and accomplish the possession, enjoyment, use, cultivation and occupation for agricultural purposes by defendant H. Doi, and thereafter to continuously keep and maintain the defendant H. Doi in such possession, enjoyment, use, cultivation and occupation for agricultural purposes, and to the use and beneficial interest of said H. Doi, of certain land situated in the County of San Diego, which land was agricultural land; that defendant H. Doi is an alien ineligible to citizenship, and was not authorized by law or any treaty between the United States and the Empire of Japan, or any other nation or country, to acquire, possess, enjoy, use, cultivate or occupy real property, nor have either in whole or in part any beneficial use of or interest in real property for agricultural purposes.

It further alleges, while the conspiracy was in effect, to wit, on or about August 13, 1931, and in furtherance of and to accomplish and effect the purposes and objects thereof, the defendants did the following acts, viz: That defendant George Morrison put the defendant H. Doi in possession of, and did permit, aid and encourage H. Doi to go into possession of and to use, enjoy, cultivate and occupy said land, and that said H. Doi did go into possession of said land and did use, enjoy, cultivate and occupy same, and did raise and harvest crops thereon for his own use and benefit, contrary to the statute and against the peace and dignity of the people of California. Trial by jury was waived, with the consent of the district attorney, and the action was tried before the court. The only evidence introduced consists of the following stipulation:

> "It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into pos-

session of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

It was on this stipulation and the allegations in the indictment that the court found the defendants guilty. The appeal was from the judgment and from an order denying a motion for a new trial.

The points raised are that Section 9*a* of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, purporting to cast upon the defendant H. Doi the burden of proving he was a citizen of the United States or eligible to become one, where no proof whatsoever was introduced as to his citizenship or ineligibility to citizenship, but the indictment alleged that he was ineligible to citizenship, is unconstitutional and void, being discriminatory and in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and as violating the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and as violating Section 13, Article I, of the Constitution of the State of California.

Section 9*a* of this Act, thus attacked, reads as follows:

"SEC. 9*a*. Citizenship Must be Proved by Defendant.—In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the

beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

The ruling of the Superior Court of San Diego County, which brings this case within the jurisdiction of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is the decision of guilty, based solely on the stipulation herein set out, and the benefit and effect of Section 9*a* if the Alien Land Act (Stats. 1927, p. 881), and Section 1983 of the Code of Civil Procedure of California.

The ruling of the Supreme Court of the State of California, being the highest court in the State of California having jurisdiction to decide this matter, which brings this case within the jurisdiction of the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, is the decision of said court affirming the judgment of said superior court, and holding that Section 9*a* of said Alien Land Act (Stats. 1927, p. 881) and Section 1983 of the Code of Civil Procedure of California, were constitutional, and did not violate said Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are as follows:

Section 1 of the Fourteenth Amendment to the Constitution of the United States are as follows:

"SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immuni-

ties of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The validity of the legislation creating presumptions similar to that provided for by Section 9*a* of said Act has frequently been before the courts of this and other jurisdictions, with the result that it has uniformly been declared invalid.

McFarland v. *American Sugar Refining Co.*, 241 U. S. 79, where the Supreme Court held that a presumption to the effect that any person engaged in the business of refining sugar within the State of Louisiana who should systematically pay in Louisiana a less price for sugar than he pays in any other State, shall be *prima facie* presumed to be a party to a monopoly or conspiracy in restraint of trade, was invalid as being in violation of the Fourteenth Amendment to the Constitution of the United States.

A recent decision of the Supreme Court of the United States is to the same effect and sustains appellants' position, viz: *Manley* v. *Georgia*, 279 U. S. 1, where the Court held unconstitutional a statute of Georgia which allowed a conviction of fraud upon mere proof of insolvency, on the ground that the statutory presumption was not rational and that the connection between the fact proved and that presumed was not rational.

To the same effect is *Western & Atlantic R. R.* v. *Henderson*, 279 U. S. 639, holding unconstitutional a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision, upon the ground that a statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary and irrational.

According to the unbroken line of authorities, a presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power.

State v. *Lapointe*, 81 N. H. 227, 123 Atl. 692.

O'Neill v. *U. S.*, 19 Fed. (2d) 322, held that Congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the first penal provision, Section 1, of the Harrison Anti-Narcotic Act.

Simpkins v. *State*, 249 Pac. 168, decided that a statute of Oklahoma providing that if a person driving an automobile had on or about his person any intoxicating liquors, that fact would constitute *prima facie* evidence of such person having driven while intoxicated, could not stand; that the inference between the fact of possession and the presumption of intoxication was too remote.

The following cases, we believe, also sustain the jurisdiction of the Supreme Court of the United States:

Bailey v. *Alabama*, 219 U. S. 219, 31 Sup. Ct. Rep. 145;
State v. *Wilson*, 1 Atl. 415, 15 R. I. 180;
State v. *Potello*, 119 Pac. 1023;
State v. *Beswick*, 13 R. I. 211, 36 Am. Rep. 102;
Ex parte Smith, 218 Pac. 708;
In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044;
State v. *Crimmett*, 193 Pac. 380;
State v. *Divine*, 4 S. E. 477;
Brightman v. *U. S.*, 7 Fed. (2d) 532;
In the Matter of Guillermo D. Kotta, 187 Cal. 27, 200 Pac. 957;
Southern Railway Company v. *Green*, 216 U. S. 419.

People v. *Quarez*, 196 Cal. 404, and *People* v. *Frey*, 165 Cal. 140, both hold that the question of alienage is a part

of the *corpus delicti* and must be proved by the prosecution or by evidence in the case on behalf of the prosecution. Therefore, if alienage is a part of the *corpus delicti*, proof must be introduced to establish or tend to establish same. This was not done, as in the case at bar no evidence of alienage was offered, the only mention of same being in the allegation in the indictment.

Brightman v. *U. S.*, 7 Fed. (2d) 532, held, in a prosecution under the Harrison Narcotic Act, the prosecution was bound to prove as an essential element of its case that the narcotics had been purchased within the district, although the statute provided that possession of the drugs should be *prima facie* evidence of the violation of the Act.

State v. *Divine*, 4 S. E. 477, 98 N. C. 778, the statute there provided that when stock was killed or injured by a running engine, in certain counties, proof of that fact would be *prima facie* evidence of negligence of certain officials of the railroad company. The statutory presumption was held to be unconstitutional, as being unsupported by any reasonable connection between proof and the inference of guilt.

State v. *Crimmett*, 193 Pac. 380, 33 Idaho 203, defendant was convicted of grand larceny of a cow. The court instructed the jury, in accordance with the provisions of a State statute, that any person who slaughtered cattle must retain in his possession the hide of such cattle, with the ears attached, for a period of thirty days, and that proof of the failure of any person to do so should be *prima facie* evidence of the commission of the crime of grand larceny as to cattle slaughtered. The Supreme Court of Idaho held that there was no connection or rational relationship between the fact proved and the ultimate fact presumed, and that such a statute shifted the burden of proof, and in a

criminal case deprived the defendant of the protection of his constitutional guaranties.

Hall v. *Johnson*, 169 Pac. 515.

State v. *Lapointe*, 123 Atl. (N. H.) 692, involved a statute which prohibited the possession of intoxicating liquor which had been illegally acquired. The statute provided that the possession of any intoxicating liquor should be *prima facie* evidence of the violation thereof. The trial court instructed the jury that if they found that possession was proved, they must also find that the possession was illegal. No evidence was introduced upon the point by the defense. The court held the statute was unconstitutional.

People v. *Toynbee*, 20 Barb. 168;
Wynehamer v. *The People*, 13 N. Y. 378;
People v. *Lyon*, 27 Hun. 180;
People v. *Cannon*, 34 N. E. 759, 139 N. Y. 32;
Hammond v. *State*, 84 N. E. 416, 78 Ohio St. 15;
State v. *Momberg*, 103 N. W. 566;

Under Section 9*a* of the Alien Land Act, the offense consists of three things:

1. Being an alien;

2. Being ineligible to citizenship;

3. Owning, leasing, or enjoying the use of agricultural land in California.

Under Section 9*a* it is necessary for the State to prove nothing except that the defendant owns or has leased farm land in California, and has merely to allege that he is an ineligible alien. See 17 Cal. Law Rev. 577, 578.

J. MARION WRIGHT,

Respectfully submitted,

Attorney for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

AMENDMENT TO STATEMENT OF THE GROUNDS OF JURISDICTION, DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION UPON APPEAL TO REVIEW THE JUDGMENT IN QUESTION.

Filed September 19, 1933.

Come now appellants and present this their amendment to the statement of grounds of jurisdiction, disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction on appeal to review the judgment in question, to be considered part of the original

statement of grounds of jurisdiction, and to become part of same, said amendment containing authorities which were inadvertently omitted from the statement of grounds of jurisdiction disclosing the basis upon which it is contended the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question, and perhaps technically should have been contained therein, although appellants believe the said statement of the grounds of jurisdiction as a whole fully complies with Rule 12, paragraph 1, of Rules of the Supreme Court of the United States.

The statutory provision believed to sustain the jurisdiction of the United States Supreme Court is as follows: Section 344 of United States Code, Annotated, Chap. 9, Title 28 (Judicial Code, Section 237, amended):

> "Appellate Jurisdiction of Decrees of State Courts; Certiorari.—(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.
>
> "(*b*) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ

of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"(*c*) If a writ of error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the writ of error was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed: *Provided*, That where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 878 of this title. (R. S. 690, 709; Mar. 3, 1911, c. 231, 236, 237, 36 Stat. 1156; Dec. 23, 1914, c. 2, 38 Stat. 790; Sept. 6, 1916, c. 448, 2, 39 Stat. 726; Feb. 17, 1922, c. 54, 42 Stat. 366; Feb. 13, 1925, c. 229, 1, 43 Stat. 937.)"

By the Act of January 31, 1928, Chap. 14, 45 Stat. 54, the writ of error was abolished and all relief which heretofore could be obtained by writ of error is now obtainable by appeal. This Act is as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required: *Provided, however,* That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

Section 2 of the Act of January 31, 1928, above quoted, was amended April 26, 1928, Chap. 440, 45 Stat. 466, as follows:

> "An Act to amend section 2 of an Act entitled 'An Act in reference to writs of error,' approved January 31, 1928, Public, Numbered 10, Seventieth Congress.
>
> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled 'An Act in reference to writs of error,' approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:
>
> " 'Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and

of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error.' "

The above provisions are the statutory provisions believed to sustain the jurisdiction of this Court to entertain this appeal, and are the statutory and constitutional authority for this Court to hear and determine such a case. The cases believed to sustain the jurisdiction are as follows:

Ruling of the highest State court, basing its decision invalidating statute on due process clause, presents Federal question reviewable by Supreme Court.

Blodgett v. *Silberman* (Conn. 1928), 48 S. Ct. 410, 277 U. S. 1, 72 L. Ed. 249.

Whether a State court denied rights asserted under local law protection guarantee by the Federal Constitution is a question on which the United States Supreme Court's judgment may be invoked.

Broad River Power Co. v. *State of South Carolina. ex rel. Daniel* (1930), 50 S. Ct. 401, 281 U. S. 537, 74 L. Ed. 1023.

State court's opinion is not final on claim arising under Federal Constitution.

Brinkerhoff-Farris Trust & Savings Co. v. *Hill* (1930), 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107 reversing (1929) 19 S. W. 2d 746, 323 Mo. 180.

Where the State court entertained the question of constitutionality of a State statute, but holding same valid, the United States Supreme Court has jurisdiction on certiorari.

Cumberland Coal Co. v. *Board of Revision of Tax Assessments in Greene County* (Va. 1931), 52 S. Ct. 48 reversing (1930) 302 Pa. 179.

State court's finding that ordinance fixing rates for water power did not impair prior contract is not conclusive on this Court.

John P. King Mfg. Co. v. *City Council of Augusta* (Ga. 1928), 48 S. Ct. 489, 277 U. S. 100, 72 L. Ed. 801.

Where State statute is challenged in State court under due process clause, the case is properly before the Supreme Court.

Miller v. *Schoene* (Va. 1928), 48 S. Ct. 246, 276 U. S. 272, 72 L. Ed. 568.

The Supreme Court of the United States has jurisdiction when New York Court of Appeals affirmed appellate division, which upheld State statute under Federal Constitution not referred to by Court of Appeals.

People v. *State of New York, ex rel. Bryant* v. *Zimmerman* (N. Y. 1928), 49 S. Ct. 61, 278 U. S. 63, 73 L. Ed. 184.

The original statement of jurisdiction shows there exists facts sufficient to bring the case within the statutory or constitutional authority for the United States Supreme Court to hear and determine this case.

Respectfully submitted,

J. MARION WRIGHT,
Attorney for Appellants.

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B. By so deciding said court held that the prosecution need not prove the *corpus delicti* or the two elements constituting the crime charged, viz.: (1) The alienage or ineligibility to citizenship of H. Doi, and (2) possession of agricultural land by him, but only need prove the second element 20

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C. By so deciding the court held that section 9a of the Alien Land Act, and section 1983 of the Code of Civil Procedure established a "rule of convenience," that is, the rule that when the negative of the issue does not readily permit of direct proof, or where the facts come more immediately within the knowledge of the defendant,—the *onus probandi* rests upon the defendant and the prosecution need not prove such facts.. 21

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1933
No. 487.

George Morrison and H. Doi,
Appellants,

vs.

The People of the State of California,
Respondents.

BRIEF FOR APPELLANTS.

This is an appeal from the decision of the Supreme Court of the State of California, rendered June 1, 1933, affirming the judgment of the Superior Court of the County of San Diego.

OPINION BELOW.

The opinion of the Supreme Court of the State of California is reported in 85 California Decisions at page 666; 22 Pacific 2d Series, page 718.

No opinion was delivered by the Superior Court of the County of San Diego, but the District Court of Appeal, Fourth Appellate District, delivered an opinion, found in 13 Pacific 2d Series, page 803.

JURISDICTION.

Pursuant to Rule 12 (1) and amendments thereto, of the rules of this court, appellants submitted a statement showing that the appeal was timely taken, that the judgment from which the appeal was prosecuted was final and rendered by the highest court in which a judgment in the action could be had, that there was drawn into the question the validity of a state statute, and that the decision was in favor of its validity.

Appellants also showed that the constitutional questions involved in this appeal were timely and sufficiently raised in the courts below, and that the jurisdiction of this court extends to a determination of the nature of the transaction as well as the validity of the statute, as applied, under the Federal Constitution.

After the filing of the statement as to jurisdiction above referred to (reference to same being hereby made), respondent filed a motion to dismiss the order of the Supreme Court of California allowing the appeal, and further, filed a statement disclosing grounds making against the jurisdiction of this court. Thereafter appellants filed an amendment to the statement as to jurisdiction, which amendment is printed with the original statement (reference to same being hereby made), and cited additional cases believed to sustain the jurisdiction of this court, and cited statutory provisions sustaining such jurisdiction (p. 13, Statement as to Jurisdiction).

On November 6, 1933, this court rendered an order advancing and assigning this case for argument, December 11, 1933, and postponing further consideration of jurisdiction and motion to dismiss, to the hearing on the merits.

STATUTES.

The state statute whose validity as applied is drawn into the question is Section 9a of the Alien Land Act of the State of California, as adopted in 1927 (Stats. 1927, p. 880), being a portion of the Alien Land Act of the State of California (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 880; and Section 1983 of the Code of Civil Procedure of the State of California, as adopted in 1927.)

Section 9a of said Alien Land Act (Stats. 1927, p. 880) is as follows:

> "In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, *and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.*" (Italics supplied.)

Section 1983 of the Code of Civil Procedure is as follows:

> "Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or

the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citizen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

STATEMENT OF FACTS.

The undisputed facts of the case are as follows:

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of the State of California (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 880). The indictment alleged that on or about the 27th day of August, 1931, defendants did wilfully, unlawfully and feloniously combine, conspire, confederate and agree together, by unlawful means, to bring about and accomplish the possession, enjoyment, use, cultivation and occupation for agricultural purposes by defendant H. Doi, and thereafter to continuously keep and maintain the defendant H. Doi in such possession, enjoyment, use, cultivation and occupation for agricultural purposes, and to the use and beneficial interest of said H. Doi, of certain land situated in the County of San Diego, which land was agricultural land; that defendant H. Doi is an alien ineligible to citizenship, and was not authorized by law or any treaty between the United States and the Empire of Japan, or any other nation or country, to acquire, possess, enjoy, use, cultivate or occupy real property, nor have either in whole or in part any beneficial use of or interest in real property for agricultural purposes.

It further alleges, while the conspiracy was in effect, to wit, on or about August 13, 1931, and in furtherance of and to accomplish and effect the purposes and objects thereof, the defendants did the following acts, viz: That defendant George Morrison put the defendant H. Doi in possession of, and did permit, aid and encourage H. Doi to go into possession of and to use, enjoy, cultivate and

occupy said land, and that said H. Doi did go into possession of said land and did use, enjoy, cultivate and occupy same, and did raise and harvest crops thereon for his own use and benefit, contrary to the statute and against the peace and dignity of the people of California. Trial by jury was waived, with the consent of the district attorney, and the action was tried before the court. The only evidence introduced consists of the following stipulation:

"It is stipulated that the defendant George Morrison is, and was, at all times mentioned in the indictment, a native born citizen of the United States of America, and lessee of the land described in the said amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi, to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, and encourage the said H. Doi to go into possession of, and use, enjoy, cultivate and occupy the said land, and said H. Doi did go into pos-

session of said land, and did use, enjoy, cultivate and occupy same, and did raise and harvest crops thereon for the use and benefit of said defendants and each of them."

It was on this stipulation and the allegations in the indictment that the trial court found the defendants guilty. An appeal was taken to the District Court of Appeal of the State of California, Fourth Appellate District (13 Pac. 2d, p. 803), and the case was transferred to the Supreme Court of California after decision by said Court of Appeal, and decision rendered by the Supreme Court (85 Cal. Dec., p. 666 (22 Pac. 2d, p. 718)), affirming the judgment of the trial court, although three of the seven justices dissented.

ASSIGNMENT OF ERRORS.

Appellants contend that in affirming the judgment of the trial court, the Supreme Court of California erred in the following particulars:

I.

That the court erred in holding that Section 9a of the Alien Land Act as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure of the State of California, also adopted in 1927, were constitutional, and do not violate the Fourteenth Amendment to the Constitution of the United States.

II.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927,

p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, were constitutional, and do not violate the due process of law clause of the Fourteenth Amendment to the Constitution of the United States.

III.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States and of the State of California, of rights, privileges and immunities secured to the citizens of the United States by the Federal Constitution.

IV.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive appellants and other citizens of the United States of liberty and property without due process of law.

V.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, did not deprive and deny to appellants and certain citizens and persons within the jurisdiction of the State of California the equal protection of the law.

VI.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which provide that in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of said Act, when the proof introduced by the State, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property, or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment, or information, alleges the alienage and ineligibility to United States citizenship of said defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon the defendant, are not in conflict with the due process law provisions of the Constitution of the United States and the Constitution of the State of California.

VII.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, without requiring any proof whatsoever to be first made by the State or the people, and solely by reason of an allegation in the indictment alleging the ineligibility to United States citizenship of said defendant,

are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

VIII.

The Court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, which cast upon the defendant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States as a prerequisite to the enjoyment and occupation, or a beneficial interest in real estate in California, for agricultural purposes, are not in conflict with the due process of law provisions of the Constitution of the United States and the Constitution of the State of California.

IX.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, or statutes of the State of California, placing upon appellant H. Doi the burden of showing he is a citizen of the United States by birth or by naturalization, solely by reason of the allegation of his ineligibility to citizenship in the indictment, without any proof of any kind as to his citizenship or ineligibility to become a citizen, do not violate the due process clause and Section 13, Article I of the Constitution of California,

and are not discriminatory or in violation of the equal protection clause of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

X.

The court erred in applying to the case the so-called "rule of convenience," that is, the rule that when the negative of the issue does not readily permit direct proof or where the facts come more immediately within the knowledge of the defendants, the *onus probandi* rested upon the appellants.

XI.

The court erred in holding that the burden of showing that appellant, H. Doi, was a citizen of the United States or eligible to become a citizen, a fact that was part of the *corpus delicti* and must be proven before a conviction could be had, was not upon the prosecution or appellee, but was upon the appellant.

XII.

The court erred in holding that under Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, there was a rational connection between the facts proved and the ultimate facts presumed.

XIII.

The court erred in holding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats., p. 880) and Section 1983 of the Code of Civil Procedure, also adopted

in 1927, did not, by casting upon appellant the burden of proving citizenship or eligibility to citizenship, compel said appellant, H. Doi, to be a witness against himself.

XIV.

The court erred in holding and deciding that appellant, H. Doi, solely by reason of the allegation in the indictment that he was an alien, ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural property, was required to prove that he was a citizen either by birth or naturalization.

XV.

The court erred in holding and deciding that Section 9a of the Alien Land Act, as adopted in 1927 (Stats. 1927, p. 880) and Section 1983 of the Code of Civil Procedure, also adopted in 1927, should cast upon appellant, H. Doi, the burden of proving his citizenship or eligibility to citizenship under the naturalization laws of the United States, as a prerequisite to the enjoyment and occupation of or a beneficial interest in real estate in California, for agricultural purposes, are not discriminatory and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XVI.

The court erred in holding that Section 9a of the Alien Land Act (Stats. 1927, p. 880) establishes a "rule of evidence."

XVII.

The court erred in deciding there was a natural and rational evidentiary relation between the facts proved and those presumed under Section 9a of the Alien Land Act.

XVIII.

The court erred in holding that the provisions of Section 9a of the Alien Land Act (Stats. 1927, p. 880), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the State, under the provisions of such Act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or interest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are valid, and the enactment of such section was a valid exercise of the power of the Legislature.

XIX.

The court erred in holding that the Legislature by statutory enactment has cast the burden upon those whose eligibility is challenged, in the name of the State, of proving such eligibility.

XX.

The court erred in ordering judgment to be entered affirming the judgment of the Superior Court of San Diego, California, after judgment in District Court of Appeal, Fourth District.

SUMMARY OF ARGUMENT.

I. THE SUPREME COURT OF CALIFORNIA ERRED IN DECIDING THAT SECTION 9a OF THE ALIEN LAND ACT, AND SECTION 1983 OF THE CODE OF CIVIL PROCEDURE, WERE VALID EXERCISES OF LEGISLATIVE POWER.

A. By so deciding the court held that solely by reason of the allegation in the indictment that he is an alien ineligible to citizenship, and the introduction of proof that he had the enjoyment, use, cultivation and occupation of agricultural land, defendant H. Doi was required to prove he was a citizen or eligible to citizenship, and the burden was upon him to do so.

B. By so deciding said court held that the prosecution need not prove the *corpus delicti* or the two elements constituting the crime charged, viz: (1) the alienage or ineligibility to citizenship of H. Doi, and (2) possession of agricultural land by him—but only need prove the second element.

C. By so deciding said court held that Section 9a of the Alien Land Act and Section 1983 of the Code of Civil Procedure established a "rule of convenience," that is—the rule that when the negative of the issue does not readily permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the *onus probandi* rests on him, and the prosecution need not prove such facts.

D. By so deciding the court necessarily held that there is a rational and reasonable connection or relation between the fact proven (that defendant Doi was in possession of agricultural land) and the fact presumed (that he was an alien ineligible to citizenship).

ARGUMENT.

POINT I.

The Supreme Court of California Erred in Deciding That Section 9a of the Alien Land Act, and Section 1983 of the Code of Civil Procedure Were Valid Exercises of Legislative Power.

This conclusion was reached by applying the rule of *ab inconvenienti,* commonly known as *rule of necessity and convenience,* instead of the rule that there shall be some *rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.*

A. By so Deciding Said Court Held That Solely by Reason of the Allegations in the Indictment That He Is an Alien Ineligible to Citizenship, and the Introduction of Proof That He Had the Enjoyment, Use, Cultivation and Occupation of Agricultural Land, Defendant H. Doi Was Required to Prove He Was a Citizen or Eligible to Citizenship, and the Burden Was Upon Him to Do So.

Under Section 9a therefore, the only fact necessary to prove is that defendant Doi is in possession of agricultural land, and the burden of proving that he is ineligible to citizenship is then cast upon him, or which amounts to the same thing, the defendant is then *presumed to be ineligible to citizenship.*

It therefore clearly appears that there is no rational or reasonable connection or relation between the fact proven and the fact presumed. The fact that a person is in possession of agricultural lands of the state does not in the least tend to prove that he is a member of any particular race, much less a race, the members of which are denied citizenship under our laws.

It is not within the province of the Legislature to declare an individual guilty or presumptively guilty, of a crime, and this rule has been universally followed.

McFarland v. American Sugar Refining Co., 241 U. S. 79.

The presumption created by Section 9a has no foundation except for tacit facts. This section authorizes the jury to convict unless defendant Doi assumes the burden of proving himself eligible to citizenship to their satisfaction.

It casts upon the defendant Doi the burden of negativing one of two elements of the crime charged against the defendant, viz: the alienage or ineligibility to citizenship of the defendant Doi—without the necessity of any proof being offered as to this element.

The mere allegation in the indictment really has the effect of shifting the burden of proof so that defendant Doi is required to prove his innocence.

The validity of legislation creating presumptions similar to that provided by Section 9a, has frequently been before the courts of California and other jurisdictions *with the result that it has uniformly been declared invalid.* The authorities uniformly hold that in order to sustain such legislative presumption as that created by Section 9a of said Act *it is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed.*

In the present case there is no semblance of such a connection. The mere fact that a defendant is brought into court and proof is made that he is using, or is in possession of real property susceptible of producing agricultural products is made a basis of a presumption that he is an alien ineligible to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship. *There is not the slightest connection or relationship between possession of real property and the alienage or citizinship of the person in its possession.*

According to the unbroken line of authorities, a presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power.

State v. Lapointe, 81 N. H. 227, 123 Atl. 692, 31 A. L. R. 1212.

B. By so Deciding Said Court Held That the Prosecution Need Not Prove the Corpus Delicti or the Two Elements Constituting the Crime Charged, viz: (1) The Alienage or Ineligibility to Citizenship of H. Doi, and (2) Possession of Agricultural Land by Him, but Only Need Prove the Second Element.

The crime charged against defendant consists of two elements, (1) the alienage and ineligibility to citizenship of H. Doi, and (2) the possession of agricultural land by him. The second of these two elements *was proven but there was no evidence whatsoever in support of the first element*—alienage and ineligibility to citizenship of H. Doi.

It was held in

People v. Quarez, 196 Cal. 402, 238 Pac. 363,

which was a prosecution under an information charging the defendant with having in his possession a revolver capable of being concealed, defendant being at the time a foreign born person and not a naturalized citizen of the United States; that the *corpus delicti* of the offense consisted of two elements—(1) the possession of a concealed weapon and (2) by a foreign born and unnaturalized person; and that if the proof of the prosecution were to stop with the showing that the defendant had possession of a concealed revolver of the prohibited type, *no offense would have been proven; the prosecution had to prove, in addition thereto, that the defendant was an alien.*

Section 9a and Section 1983 of the Code of Civil Procedure were enacted by the Legislature after the Quarez

decision, to try to make it easy to convict in that class of cases, and by the case of

People v. Osaki, 209 Cal. 169, 286 Pac. 1025,

the Supreme Court of California endeavored to sustain this class of legislation; however, the Osaki case *is not binding here as the evidence in that case showed defendant Osaki was an ineligible alien, without the necessity of invoking the aid of the burden of proof provisions of the amendment to the Alien Land Act.* The court was not called upon to decide the constitutionality of Section 9a in that case as the evidence brought the case within the provisions of Section 9b, with which we are not here concerned.

C. By so Deciding the Court Held That Section 9a of the Alien Land Act, and Section 1983 of the Code of Civil Procedure Established a "Rule of Convenience," That Is, the Rule That When the Negative of the Issue Does Not Readily Permit of Direct Proof, or Where the Facts Come More Immediately Within the Knowledge of the Defendant,—the Onus Probandi Rests Upon the Defendant and the Prosecution Need Not Prove Such Facts.

It was ultimately decided by the Supreme Court of California in the case of

People v. Quarez, 196 Cal. 404, 238 Pac. 363,

that the foreign nativity of the defendant, being an essential element of the *corpus delicti, did not come within the rule of "ab inconvenienti" and that this element must be proven by the prosecution.*

This case further thoroughly discussed the contention of the Attorney General to the effect that a slight amount of proof only is necessary to satisfy the law when proving a negative in a case, where a fact is peculiarly within the knowledge of the other party; and also that if the evidence to prove a fact is chiefly, if not entirely, within the defendant's control, the burden rests on him to produce the evidence.

The court there held that these rules enunciated a correct principle, and that they have been consistently followed in this state *in those cases involving the unlawful practice of medicine without a license, or in liquor or other cases where a license is required by law, and it is easy for the defendant to produce a license if he has one*— but the court held that this exception to the general rule of *ab inconvenienti* has *in this state been confined to* that *particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the non-existence of* A LICENSE—and the court said the rules should not be applied so as to make less imperative, in the enforcement of the law, the duty of the prosecution to establish the charge. That this *exception to the general rule is not the universal application in the State of California in criminal cases, and cited*

People v. Frey, 165 Cal. 140, 131 Pac. 127,

as an authority.

In the Quarez case, *supra,* quoting from the Frey case, and referring to the rule of *ab inconvenienti,* the court said:

> "Nor does this case come within the rule that negative allegations regarding matters peculiarly within the knowledge of the defendant *need not be proven. That is a special rule applicable to such prosecutions as those for practicing some profession or following some calling without the license provided therefor by law."* (Italics supplied.)

D. By so Deciding the Court Necessarily Held That There Is a Rational and Reasonable Connection or Relation Between the Fact Proven (That Defendant Doi Was in Possession of Agricultural Land) and the Fact Presumed (That He Was an Alien Ineligible to Citizenship).

If there is no rational or reasonable connection between the fact proven and the fact presumed—*the presumption is invalid,* being in violation of the Fourteenth Amendment of the United States Constitution; *and is discriminatory,* depriving defendant of the due process of law and the equal protection clause of Section 1 of the Fourteenth Amendment of the Constitution of the United States; and of Section 13, Article I, of the Constitution of California.

AUTHORITIES SUPPORTING APPELLANTS' CONTENTIONS.

As heretofore stated, the Supreme Court of California held Section 9a constitutional by holding that it came under the rule of *ab inconvenienti,* but failed to pass upon the contention of appellants that in order for the section to be constitutional it is essential that there shall be *some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.* In support of their contention that the rule *ab inconvenienti* did not apply and was not applicable to the case at bar, but applied only to cases where the prosecutions were those for *practicing some profession or following some calling without the license* provided therefor by law, appellants cite the following authorities:

People v. Quarez, 196 Cal. 404, 238 Pac. 363, and
People v. Frey, 165 Cal. 140, 131 Pac. 127,

both of which seem to hold squarely that the rule *ab inconvenienti* is limited in its application to prosecutions of persons charged with the violation of statutes regulating the practice of medicine and other professions and certain callings, which provide that a license shall first be obtained before any person may engage in the practice of such professions or callings. The Quarez case was a unanimous opinion of the Supreme Court of California, and the question was squarely determined. The case of

People v. Osaki, 209 Cal. 169, 286 Pac. 1025-1036,

is relied on by appellee and is cited by the Supreme Court of California as authority for its decision in holding Section 9a constitutional. That case, however, considered both sections 9a and 9b and the evidence there was sufficient to show that Osaki was a Japanese and of the Japanese race; in fact the court said that both parties tried the case on the theory that the defendant was a Japanese and of the Japanese race. Therefore, the case was really decided on the ground that the evidence produced by the prosecution was sufficient in itself to show the accused was an ineligible alien without the necessity of invoking the aid of burden of proof provisions of said amendment, viz: Section 9a, and the validity of said burden of proof provision, viz: 9a, was never considered at any great length. In that case the Supreme Court further would not extend the rule of convenience of burden of proof to common law crimes generally designated as *maulum in se* nor to all crimes *maulum prohibitum.* It only applied the rule to the amendments of the Alien Land Act. The court in the Osaki case spent a great deal of time showing that the rule *ab inconvenienti* was recognized a long time ago in England and quoted from several of the old English cases. The case of

People v. Velasquez, 70 Cal. App. 362, 233 Pac. 359,

is also cited by the Supreme Court of California in its opinion as supporting its view that the application of the rule of convenience is sound in reason and is sustained by the greater weight of authority. However, the Quarez case (*supra*) was decided after the Velasquez case, and in the Velasquez case the prosecution really proved that the

defendant was foreign born, the point there decided was that it was not necessary after proving he was foreign born, to further show he had never been naturalized.

Appellee will no doubt cite many cases to sustain its contention that the rule of inconvenience is applicable, but some of these cases were discussed in the Quarez case, and after considering them the court said that the rule *ab inconvenienti* was an exception to the general rule, and in California has been confined to that particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the non-existence of a license required by law. In such cases the burden of the issue is put upon the defendant, because it is easy for him to meet it, but *the court said the rule should not be applied so as to make less imperative in the enforcement of the law, the duty of the prosecution to establish the charge that the rule was an exception to the general rule.*

The Supreme Court of California in its opinion in the case at bar states that the Quarez case leans heavily upon

People v. Frey, 165 Cal. 140, 131 Pac. 127,

and shows that the Frey case was adopted by a bare majority of the court. However, the Quarez case was adopted by a unanimous court. It will be noted that the opinion of the Supreme Court in the case at bar was also adopted by *a bare majority,* four of the justices signing the opinion, and three dissenting, with an opinion. The dissenting opinion seems to be the most logical and seems to be supported by competent authorities, and appellants feel that the dissenting opinion is the opinion that should be followed by this court.

The following cases squarely support appellants' position. We therefore cite them briefly:

McFarland v. American Sugar Refining Co., 241 U. S. 79, 36 S. Ct. 498, 499, 60 L. Ed. 899,

involved a statute of Louisiana which purported to impose penalties for monopolies and conspiracy in restraint of trade. By this statute it was provided that

> "Any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State, shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce and upon conviction thereof shall be subject to a fine. . . ."

The Supreme Court of the United States held that this presumption was invalid as being in violation of the Fourteenth Amendment and, speaking through Mr. Justice Holmes, disposed of the case as follows:

> "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. *It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate.'* (Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U. S. 35, 43, 55 L. Ed. 78, 80, 32 L. R. A. (N. S.) 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243. The presumption created here has no relation in experience to general facts. It has no foundation except with tacit reference to the plaintiff. But it is not within the province

of a legislature to declare an individual guilty or presumptively guilty of a crime. If the statute had said what it was argued that it means, that the plaintiff's business was affected with a public interest by reason of the plaintiff's monopolizing it, and that therefore the plaintiff should be *prima facie* presumed guilty upon proof that it was carrying on business as it does, we suppose that no one would contend that the plaintiff was given the equal protection of the laws. We agree with the court below that the act must fall as a whole, as it falls in the sections without which there is no reason to suppose that it would have been passed." (Italics supplied.)

Brightman v. U. S., 7 Fed. (2d) 532,

involved a prosecution under the Harrison Narcotic Act. The Circuit Court of Appeals for the Eighth Circuit held that the prosecution was bound to prove, as an essential element of its case, that the narcotics had been purchased within the district. Although the statute provided that the possession of drugs should be *prima facie* evidence of the violation of the Act, it was held that:

"There is in our judgment no such rational connection between the fact of the possession of morphine in the western district of Oklahoma and the fact of a purchase of it in that same district as to make the former *prima facie* evidence of the latter. Common experience does not support such a presumption."

O'Neill v. U. S. 19 Fed. (2d) 322, was also a

prosecution for a violation of the Harrison Narcotic Act. In that case the defendant was convicted of the offense of selling drugs without paying the special tax required by the Act. The prosecution relied upon the *prima facie* pre-

sumption which was claimed to arise under the statute from the possession of unstamped drugs. The court said:

> "The general principle is well recognized that even in criminal prosecutions, Congress or a State Legislature may with certain limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. 12 C. J. p. 823, Sec. 285. The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate; and the accused must not be deprived of a proper opportunity to present his defense to the main fact so presumed and have the case submitted upon all the evidence to the jury for its decision."

After citing and quoting from numerous authorities in support of this rule, the conclusion of the Court was expressed as follows:

> "In our opinion, Congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the first penal provision of section 1."

We have cited the federal authorities first of all, because the statute under discussion infringes the due process clause of the federal constitution. But the decisions of the state courts are to the same effect and require, as an element of due process, that in a criminal case a presumption of guilt or any presumption unfavorable to the defendant upon any issue, must be supported by a rational connection between the fact proved and the statutory in-

ference drawn therefrom, and hold that in the absence of such rational connection the statute is void.

State v. Divine, 4 S. E. 477, 98 N. C. 778,

was a prosecution for the violation of a statute prohibiting the negligent killing of livestock by a railroad. The statute provided that when stock was killed or injured by a running engine in certain counties, proof of that fact should be *prima facie* evidence of the negligence of certain specified officials of the railroad company. The statutory presumption was held to be unconstitutional and void as being unsupported by any reasonable connection between the proof and the inference of guilt.

In another case the Justices of the Supreme Judicial Court of Massachusetts delivered an opinion on the validity of a proposed act providing that working more than eight hours in any one day should be *prima facie* evidence of the violation of a statute forbidding persons from working more than eight hours per day, except that employees given a Saturday half holiday might work more than eight hours on other days of the week. It was held that this presumption would be invalid as being contrary to fundamental principles of criminal law.

In re Opinion of Justices, 94 N. E. 1044; 208 Mass. 619.

In

State v. Grimmett, 193 Pac. 380, 33 Idaho 203,

the defendant was convicted of grand larceny of a certain cow. The trial court instructed the jury, in accordance with the provisions of a state statute, that any person who slaughters cattle must retain in his possession the hide of

such cattle with the ears attached thereto for a period of thirty days and that proof of the failure of any person to do so should be *prima facie* evidence of the commission of the crime of grand larceny as to the cattle slaughtered.

After citing many authorities, the Supreme Court of Idaho stated the rule as follows:

> "So long as the evidence is of itself material and relevant, the statute may make it *prima facie* proof of the ultimate fact which it tends to establish, and may thus shift the burden of evidence. Where, however, there is no connection or rational relationship between the fact proved and the ultimate fact to be presumed, such a statute shifts the burden of proof, and in a criminal case deprives the defendant of the protection of his constitutional guaranties."

Applying this rule to the case before the Court, its conclusion was stated as follows:

> "The act of a person in disposing of the hide of an animal within 30 days after it has been slaughtered by him is an act innocent in itself, except as made otherwise by statute. It may be necessary in the face of a falling market in order to prevent financial loss. It does not tend to prove that the animal slaughtered belonged to someone else or that it had been stolen. If the statute had referred only to the alteration of the brands upon the hide, or the defacement of other marks thereon, possibly there might have been some connection between the act and the fact to be presumed. But the statute goes further and declares that the mere fact of failing to retain possession of a hide from a slaughtered animal for 30 days is *prima facie* proof of grand larceny. Under this statute one could be convicted without any evidence that any

cattle of any description had been stolen from any person. The instruction, if followed by the jury, relieved the state from the necessity of offering any evidence of the *corpus delicti*. It deprived the defendant of the benefit of any presumption of innocence, and required him to take the burden, not only of proving his own innocence, but perhaps of proving that the crime had not been committed."

Other cases which hold statutory presumptions to be unreasonable and therefore unconstitutional and void are:

Hall v. Johnson, 169 Pac. 515, 87 Ore. 21;

Ex parte Smith, 218 Pac. 708;

Simpkins v. State, 249 Pac. 168.

Ex parte Smith, supra, involved a prohibition statute of Oklahoma, which, among other things, provided that any mash found in any house or building should *prima facie* be deemed to have been made or fermented by, and to be the property of the person in actual possession or control of the house or building. The court held the presumption to be unconstitutional and void, saying in this respect:

"The rule of presumptive evidence attempted to be established by this act is based on a presumption that the person in possession of the premises and its inclosure where the things prohibited may be found had knowledge of their existence and location, and upon that presumption bases another presumption that they belonged to him and that he intended to use them for an illegal purpose. This violates the rule well established everywhere that one presumption cannot be based upon another. * * *

"* * * It could hardly be said that there was a presumption of law that the person in possession of the ranch placed it there. All the authorities agree that such a statutory rule of evidence is a dangerous one, and that it should not be applied where it has no intrinsic evidential force or where its application will impair some positive statutory or constitutional right."

Simpkins v. State, supra, was a prosecution for driving an automobile while intoxicated. The state statute provided that if a person driving the automobile had on or about his person any intoxicating liquor, that fact should constitute *prima facie* evidence of such person having driven while intoxicated. After discussing the constitutional limitation in question, the Court held the presumption to be void and said:

"It is apparent that the presumption here created violates this limitation, since in order to draw the conclusion of intoxication from the fact of the driver of an automobile having intoxicating liquors on his person or in said vehicle, there must first be the inference that the driver had used the intoxicants, and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. The presumption of intoxication fixed by the statute is also contrary to the fundamental requirement that the inference or presumption of intoxication arising from the possession of the person or in the vehicle of liquors must be a probable or natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote. The fact of possession of intoxicants on the person or in the vehicle by one

charged with the offense of driving an automobile upon the highway is properly admissible in evidence against an accused. Its weight or evidentiary value will depend upon the special circumstances, but certainly no conviction should be had of a person so charged upon the bare fact that he had intoxicants on his person or in the vehicle driven by him, where there is no other evidence of intoxication such as improper driving or irrational conduct."

In view of the uniform current of the authorities on this subject, there is no room for doubt or discussion as to the test which must be applied to any statutory presumption in a criminal case. Unless there be a connection between the fact proved and the inference, which connection is based upon reason and supported by experience, the statute is unconstitutional. *In the present case there is no semblance of any such connection. The mere fact that a defendant is brought into court and that he has used or enjoyed real property is made the basis of a presumption that he is an alien ineligible to citizenship. This is the necessary effect of Section 9a of the Alien Land Law and of Section 1983 of the Code of Civil Procedure. There is no possibility of any rational claim that the possession of land by a defendant gives rise to any inference one way or the other as to whether he is a citizen or alien, nor as to whether he is an alien who is eligible to citizenship or one who is not so eligible. It might as well be presumed from the mere fact of occupancy that the defendant had red hair or was a thief.* Further discussion of the point would, it seems to us, be useless. Under the authorities cited, the statute violates the guaranty of due process and of the equal protection of the laws.

We wish further to call the Court's attention to the case of

State v. La Pointe, 123 Atl. (N. H.) 692.

That case involved a statute which prohibited the possession of intoxicating liquor which had been illegally acquired. The statute provided that the possession of any intoxicating liquor should be *prima facie* evidence of the violation thereof. *The trial court instructed the jury that if they found that possession was proved, they must also find that the possession was illegal. No evidence was introduced upon point by the defense.* After a thorough discussion of the legal question involved, the Supreme Court held that if the statute were construed as supporting the instruction and therefore as *binding the jury to find against the defendant in the absence of evidence on his behalf, the statute was unconstitutional as a denial of the provisions of the state constitution guaranteeing the right of trial by jury in a criminal case.*

At the outset of its discussion, the court pointed out that it was not considering the validity of the presumption under the due process clause of the federal constitution. That provision would be complied with, the court conceded, if the presumption was supported by a rational connection between the fact proved and the ultimate fact presumed. But the Court pointed out that entirely irrespective of the reasonableness of the presumption and irrespective also of the validity of the statute under the due process clause, the Legislature could not constitutionally provide for a presumption of general guilt, or a presumption adverse to the defendant upon any issue in a criminal case, where the defendant chose to stand mute and offer no evidence.

The Court reviewed the earlier cases at some length and pointed out that in those decisions where statutory presumptions had been upheld in criminal cases, this result had been reached on the view that the jury were allowed to weigh the *prima facie* evidence. The Court then went on to point out that the defendant is entitled to more than a mere opportunity to explain a *prima facie* presumption, for he is guaranteed the right to have every issue of fact submitted to the jury. In this regard the Court said:

> *"It is said that so long as the defendant has preserved to him the right to fully present his defense, and then have the evidence weighed, he has nothing to complain of. But the right to make defense is not the whole right secured to one charged with crime. He has also the right to insist that before he can be found guilty there must be substantial evidence upon every fact essential to the establishment of his guilt, and that this evidence shall be weighed by the jury and found sufficient to prove the case. It is his right to decline to produce any evidence and to stand solely upon the proposition that the state must prove a case against him."* (Italics supplied.)

The Court then points out the distinction between a *prima facie* presumption and a conclusive presumption. So-called "conclusive presumptions" are *in effect rules of substantive law,* and decisions dealing with this class of presumptions are not in point. The Court then discusses the suggestion that statutes of the kind here involved have to do only with matters of procedure. In this respect the Court says:

> "Rules of *prima facie* proof in civil causes, both statutory and common law, have been sustained upon the ground that they merely regulate the duty to go

forward with the production of evidence. 2 Wig. Ev. Sec. 1354; Spilens v. Company, 79 N. H. 326, 108 Atl. 808; Gaffney v. Coffey, 81 N. H. ....., 124 Atl. ..... But the caution that legislative power in this respect must be exercised subject to 'the limitations of evidence enshrined in the Constitution' (2 Wig. Ev. Sec. 1354) has not always been heeded. * * *

"It is only upon the ground that so-called rules regulating what shall constitute *prima facie* proof in such causes amount merely to regulations of this duty to go forward, that the statutes can be sustained. The basis for these decisions is manifestly the legislative power to regulate procedure in a reasonable way. They have no bearing upon a situation where such power is lacking. In many respects there is no such power over criminal proceedings. It can not be directly provided that the accused shall furnish evidence against himself. It, of course, follows that the same thing can not be done indirectly. A statute which depends for its validity upon a legislative power to compel a defendant to proceed at certain stages of the trial, or upon certain questions, cannot be upheld when the essential legislative authority is lacking.

"In a criminal prosecution, nonaction of the defendant cannot be substituted for action upon the part of the state, as to any matter required to be established as a part of the state's case. Neither the burden of proof nor the burden of proceeding with any evidence to prove such case can be imposed upon the party charged with the crime.

"Most courts that have sustained these statutes as binding the judgment of the jury have done so upon the theory that all the Legislature had undertaken to do was to prescribe a rule of evidence. As already pointed out, this is not the real purpose and effect of

the legislation. It seeks to compel a party to go ahead in the case, to produce evidence, or else have the fact found against him as matter of law. It is a rule of procedure, and undertakes to take from the defendant rights guaranteed to him by the Constitution.

"It is herein that these statutes are fatally defective. By what authority can the Legislature impose a burden upon the defendant for not producing evidence? One will search in vain through all the decisions for any answer. No doubt the statute gives the defendant full opportunity to present all the evidence, but that does not help the situation. These statutes were not designed for, and do not apply in, cases where other evidence upon the question is produced. They apply only to cases where there is no evidence save the statutory inference from fact A to fact B, and they say to the jury that the inference is inevitable. You must find fact B if you find that fact A is proved. * * *

"To stress this so-called privilege of the defendant to produce evidence, as so many courts have stressed it, is an entire perversion of the protection guaranteed to him. It is true it is his right to produce evidence, but it is equally true that he cannot be compelled to do so, either directly or indirectly."*

The Court also points out that the rule forbidding statutes of the class under discussion applies not only where there is a general presumption of guilt, but also where there is a presumption binding the jury in the ab-

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*In connection with the constitutional right of an accused person to stand silent and insist that the prosecution prove a case against him beyond a reasonable doubt, see *People v. Cuff*, 122 Cal. 589, 592.

sence of rebutting testimony, which is adverse to the defendant upon any issue involved in the case.

"If a part of the state's case may be conclusively established in this way, so may the whole of it. If the inference from possession to illegality is to be drawn as matter of law because there is no other evidence, so might the Legislature provide that possession shall be conclusively shown by the testimony of one witness, if there be no other evidence. In such a situation the jury would be told that the testimony required that they return a verdict of guilty. If in the present case the opportunity to take away the application of the statute by producing evidence satisfies the defendant's constitutional demands, so it would in the supposed case.

"It is his constitutional right not to produce evidence. Were it not for the array of cases denying the substance of this privilege, it would seem incredible that anyone could suppose that it could be invaded by any legislation, based upon a power to penalize the exercise of the right. *Giving to him the right to produce evidence, or not, is no substitute for his right not to produce it. The former is a privilege now generally conferred. But the latter is a fundamental right which neither Legislature nor courts are at liberty to impair.* Conferring the privilege to produce cannot limit or in any way affect the constitutional right not to produce.

"It may be that under certain circumstances an inference of fact can be permitted to be drawn from the defendant's failure to produce evidence, excluding any inference as to his own testimony. Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711 (Shaw, C. J.); State v. Grebe, 17 Kan. 458 (Brewer, J.). That no inference can be drawn from his own

failure to testify has been generally recognized to be the law. 3 Wig. Ev., Sec. 272. The denial of the latter rule in a few states (State v. Bartlett, 55 Me. 200; State v. Cleaves, 59 Me. 298; 8 Am. Rep. 422; Parker v. State, 61 N. J. Law, 308, 39 Atl. 651) is based upon the logical inference to be drawn from such conduct. In none of the cases is any reasoning advanced showing that the conclusion reached does not compel the defendant to 'furnish evidence against himself.' State bluntly, those decisions come to this: His exercise of his constitutional right not to testify is evidence of his guilt.

"It is not necessary to consider whether such a limitation upon the constitutional provision can be upheld in this state. Nor is it necessary to decide whether the authorities above referred to, holding that an inference may be drawn from the defendant's failure to produce other evidence, could be followed here. If it be conceded for the sake of the argument that such a distinction could be made, or even if it were conceded that an inference could be drawn from his own failure to testify, it would not affect the result in this case.

"If such an inference were permitted, it could only be one of fact. It would still be for the jury to say whether they would or would not draw it. As before stated, any attempt to direct how much or how little weight should be given to such an evidentiary situation would be a clear invasion of the powers committed to the department of government having exclusive jurisdiction over such matters. Neither the power nor the duties of courts can be lessened in this way.

"Construed as the state claims it should be, the provision that possession shall be *prima facie* evidence of illegality cannot be sustained as a valid exercise of legislative power." (Italics supplied.)

One of the leading cases to the same effect is

State v. Beswick, 13 R. I. 211, 36 Am. Rep. 102.

In that case a statute provided that it should be the duty of a jury impanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon proof that his place of business was notorious as a place where liquor was unlawfully kept for sale, or upon proof that the place was frequented by persons of bad or intemperate character, unless there should be other evidence to rebut or control it. The Supreme Court of Rhode Island held the statute to be void as depriving the defendant of his right to trial by jury, saying:

"What is meant by 'the judgment of his peers' is the judgment of a jury, and certainly he does not have the judgment of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the general assembly were to enact that if any person were generally reputed to be guilty of a murder it should be prima facie evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the judgment of

his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt." (Italics supplied.)

In the later case of

State v. Wilson, 1 Atl. 415, 15 R. I. 180,

the Court had under consideration a statute which did not compel the jury to convict upon proof of the character of the premises, but simply provided that the notorious character of the premises "should be evidence" of the existence of a nuisance. The Court points out the distinction between such a statute and the one involved in

State v. Beswick,

saying:

"The fault of the provision contained in State v. Beswick was that it made reputation *prima facie* evidence and thus made it a duty of the jury to convict on such evidence if unrebutted, whether satisfied by it of the guilt of the accused or not."

The doctrine of the *Beswick* and *La Pointe* cases has been approved by a long line of decisions, among which we cite the following:

People v. Toynbee, 20 Barb. 168;

Wynehamer v. People, 13 N. Y. 378;

People v. Lyon, 27 Hun. 180;
People v. Cannon, 34 N. E. 759, 139 N. Y. 32;
Hammond v. State, 84 N. E. 416, 78 Ohio St. 15;
State v. Momberg, 103 N. W. 566;
State v. Potello, 119 Pac. 1023.

In *People v. Cannon, supra,* the Court of Appeals of New York, after stating that the Legislature might under some circumstances provide for *prima facie* presumptions in criminal cases, said that this power was subject to certain definite limitations. It then described these limitations as follows:

> "The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary; and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper."

In *State v. Potello, supra,* the Court said:

> "Now, what is meant by the term '*prima facie*' as here used in the statute? If the meaning to be given it is that unless rebutted by other evidence, or discredited by circumstances, it becomes conclusive of the fact of guilt and to operate upon the minds of the jury as decisive of that fact, a meaning sometimes given the term (Kelly v. Jackson, 31 U. S. 622, 8 L.

Ed. 523; State v. Burlingame, 146 Mo. 207, 48 S. W. 72), then again we are of the opinion that the Legislature would have encroached upon the judiciary. That is to say, we would be of such opinion, if, upon the proof of the facts which the Legislature has declared shall be deemed a *prima facie* case of guilt even though unrebutted and unexplained, the jury would be required to find the accused guilty of the alleged offense, though they should not be convinced of his guilt beyond a reasonable doubt."

The Supreme Court of the United States has handed down two decisions which bear directly on the question at issue. The first of these is

Manley v. Georgia, 279 U. S. 1, 49 S. Ct. 215; 73 L. Ed. 575.

In that case the Supreme Court held to be unconstitutional a statute of Georgia which allowed a conviction of fraud on mere proof of insolvency, on the ground that the statutory presumption was not rational and that "the connection between the fact proved and that presumed is not sufficient."

Still later, and on May 27, 1929, the Supreme Court of the United States handed down its decision in

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445, 73 L. Ed. 884.

In that case it was held that a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision was unconstitutional. *This pronouncement of the Supreme Court, is based on the grounds that a state statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary or irrational.*

Finally, the whole question under discussion has been reviewed in two notes in the July, 1929, issue of the California Law Review (17 Cal. Law Review 565, 575). The authorities are fully discussed in those notes and the unconstitutionality of the 1927 legislation is demonstrated thereby.

Referring to the question as reviewed in 17 Cal. Law Review, 565, 575, we wish to call your attention to the following:

After discussing the illegality of *prima facie* presumptions which are not justified as a matter of reason, the annotator says:

> "The greatest assistance, however, which can be given the prosecution, and so the heaviest burden which can be put upon the defendant, under any system of law which provides for a judicial determination of the facts, consists in an outright shifting of the burden of proof from the prosecution, where the common law placed it, to the defendant, where Section 9a and 9b of the California Alien Land Law, as amended, place it in respect of at least one of the essential elements of the offense which the act creates. The language of the amendment is clear and umistakable, and leaves nothing to conjecture or doubtful interpretation. There is no question here of simple presumptions, of weighing presumptions, or of a *prima facie* case. *The burden of disproving ineligibility or alienage, both of which are essential elements of the offense charged, is placed upon the defendant; and unless he succeeds in disproving one of them, he must be convicted.* The offense, as defined by the statute and analyzed by the court, consists of three things: (1) being an alien; (2) being ineligible to citizenship by naturalization; (3) owning, leasing, or

enjoying the use of agricultural land in California. *Under Section 9a it is necessary for the state to prove nothing except the fact that the defendant owns or has leased farm land in California, and merely to allege that he is an ineligible alien.* Proof of owning or leasing the land (which in itself is not wrong, nor even prohibited), together with an allegation of two other facts, alienage and ineligibility to citizenship (neither of which is an offense in itself), constitutes the entire case for the state; and unless the defendant raises a reasonable doubt as to the ownership or the renting, which is the only thing which the state has attempted to prove; or disproves the charge of being an ineligible alien, to establish which the state need introduce no proof whatever, then nothing can save him from conviction." (Italics supplied.)

17 Cal. Law Rev., 577, 578.

As showing that a statute which imposes upon a defendant a heavier burden of proof than would normally rest upon him, is far more obnoxious to the constitution than a mere *prima facie* presumption, we call particular attention to the case of

Western & Atlantic Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445,

already cited. That case involved a statute of Georgia which provided for liability of a railroad company for damages done by its locomotives or cars "unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company." As interpreted by the state court, this statute did not merely create a presumption which would be dissipated upon the

introduction of testimony, but operated to cast *upon the railroad company the burden of proving freedom from negligence.* Now the striking feature about this case is not only that it was a civil case (as to which the Legislature might create presumptions more freely than in criminal cases), but that the Supreme Court was confronted with its previous decision in *Mobile Railroad v. Turnipseed,* 219 U. S. 35, where it had held that a state legislature might provide for a statutory inference of negligence from proof of a collision. When the *Henderson* case first came before the Court on January 2, 1929, the Court summarily dismissed the appeal "for want of a substantial federal question on the authority of *Mobile Railroad v. Turnipseed,* 219 U. S. 35," (49 Sup. Ct. Rep. 176). A few weeks later, on January 21, 1929, a petition for rehearing was granted and the case was restored to the docket "as one in which the court finds that probable jurisdiction has been shown." (49 Sup. Ct. Rep. 186.) The case was argued on April 17th, and on May 27th the decision was handed down, *holding not only that the statute was void, but also that the Turnipseed case did not apply, because the Georgia statute did more than create a mere inference and, as interpreted by the state court, threw the burden of proof on the issue of negligence upon the defendant.* Distinguishing the two cases, the Court said:

> "That case is essentially different from this one. Each of the state enactments raises a presumption from the fact of injury caused by the running of locomotives or cars. The Mississippi statute created merely a temporary inference of fact that vanished upon the introduction of opposing evidence. Gulf, M. & N. R. Co v. Brown, 138 Miss. 39, 66, 102 So. 855 *et seq.;* Columbus & G. Ry. Co. v. Fondren, 145 Miss. 679,

110 So. 365. That of Georgia as construed in this case creates an inference that is given effect of evidence to be weighed against opposing testimony, and is to prevail unless such testimony is found by the jury to preponderate."

It is quite clear, therefore, that if a state cannot create an irrational presumption, it cannot, a *fortiori, throw upon the defendant the burden of proof upon the mere production of evidence which has no rational connection with the issue as to which the burden is thus transferred. The present case must be decided on at least as favorable a basis as if the statute had said in so many words that the mere occupation of land by a defendant will result in a presumption that he is an ineligible alien.*

The present case is one where the statutory presumption is not justified by any rational connection between the fact proved and the inference drawn therefrom. The Supreme Court of the United States has uniformly held that in such a case the statute is void as constituting a denial of due process.

In

Bailey v. Alabama, 219 U. S. 219,

the statute involved a *prima facie* presumption of fraud upon proof of a mere breach of contract. The defendant was allowed to rebut the presumption. The fraudulent intent was difficult to prove, as it always is, and the knowledge with respect to the fraud lay peculiarly with the defendant. Nevertheless, the statutory presumption was held to be void.

In

McFarland v. American Sugar Refining Co., 241 U. S. 79,

the statute provided for a presumption of a conspiracy to restrain trade upon proof of payment within the state of a smaller price for commodities than was paid elsewhere. The existence of the conspiracy was necessarily within the peculiar knowledge of the defendants, they were allowed by the statute full opportunity to rebut the presumption, and the crime was in its nature difficult of proof. Yet the Supreme Court held the statute to be unconstitutional.

In

Manley v. Georgia, 279 U. S. 1,

the statute called for a prima facie presumption of fraud on the part of the directors of a bank upon proof of the insolvency of the bank. The directors could rebut, the fraud was necessarily difficult to prove and no one knew better than the defendants the facts which would determine the existence or nonexistence of the alleged fraud. Notwithstanding these facts the statute was held to be void.

Finally, in

Western Railroad v. Henderson, 279 U. S. 639, 49 Sup. Ct. Rep. 445,

the case already discussed, the *defendant was allowed to show freedom from negligence, the facts were within its knowledge* and they were no doubt considered to be difficult of proof. But the statute was not saved by any of these considerations.

It is useless, therefore, to refer to the ability of the defendants to rebut the statutory presumption and carry the statutory burden of proof, and likewise useless, as a legal question, to refer to the difficulty of proving the crime or the fact that the circumstances surrounding the crime are within the knowledge of the defendant. No such excuse has ever saved any statute condemned by the Supreme Court. Moreover, the same excuse could be made by any statutory presumption of crime. *Hardly a criminal charge can be imagined in connection with which it could not be said that defendant had peculiarly within his knowledge facts which could show his guilt or innocence; and almost every crime involves difficulties of proof.* These are false quantities in measuring the sufficiency of a statutory presumption. The sole inquiry must be whether or not the crime itself or an essential element thereof is to be presumed without proof of the fact itself or of some other fact upon which a rational inference of guilt can be predicated.

It thus appears from the decisions of the Supreme Court of the United States, which of course are controlling on the question at issue, that the test to be applied is *not* whether or *not* defendant knows the fact *nor* whether the crime is difficult to prove, but *whether the statute is sustained by the rational connection which all cases require.*

The question involved is a very serious one, and an expression from this Court is necessary to limit the extent to which legislatures may go in shifting the burden of proof. An argument may be made that it will be impossible to make proof of ineligibility to citizenship if section 9a is held unconstitutional. The answer to this claim is

that section 9b has already been held constitutional by the Supreme Court of California, and the Supreme Court of the United States has refused to accept the case on the ground that no federal question is involved. Under section 9b, by proving that the alien is of a race ineligible to citizenship or that he belongs to such a race, the burden shifts to him to show that he is a citizen or is eligible, so the State is amply protected by section 9b.

Motion to Dismiss Order Allowing Appeal Should Be Denied.

The motion to dismiss upon the want of jurisdiction of the Supreme Court is on the grounds that the paper purporting to allow the appeal is irregular and uncertain, and not supported by sufficient grounds for appeal, and because the question upon which it is claimed the jurisdiction of the U. S. Supreme Court depends is so frivolous as not to need further argument. Appellants' statement as to jurisdiction, and the amendment to said statement, reference to which is hereby made, both show a substantial federal question is involved, and if there was any criticism of the original statement of jurisdiction, certainly that criticism was cured by the amendment to the statement of the grounds of jurisdiction which is now before the court. The authorities cited in the amendment to the statement as to jurisdiction amply show the jurisdiction of this Honorable Court to hear and determine the question, and show that a federal question is presented and is reviewable by this court.

Whether a state court denied rights asserted under local law protection guaranteed by the federal Constitu-

tion is a question on which the U. S. Supreme Court's judgment may be invoked.

Broad River Power Co. v. State of S. Carolina Ex. Rel. Daniel (1930), 50 S. Ct. 401, 281 U. S. 537, 74 L. Ed. 1023.

State court's opinion is not final on question arising under the federal Constitution.

Brinkerhoff Ferris Trust & Savings Co. v. Hill (1930), 50 S. Ct. 451, 281 U. S. 673, 74 L. Ed. 1107, reversing (1929) 19 S. W. 2d 746, 323 Mo. 180.

Where the state court entertained the question of constitutionality of a state statute, but holding same valid, the U. S. Supreme Court has jurisdiction on certiorari.

Cumberland Coal Co. v. Bd. of Revision of Tax Assessments in Greene County (Va. 1931), 52 S. Ct. 48 reversing (1930), 302 Pa. 179.

State court's finding that ordinance fixing rates for water power did not impair prior contract is not conclusive on the U. S. Supreme Court.

John P. King Mfg. Co. v. City Council of Augusta (Ga. 1928); 48 S. Ct. 489; 277 U. S. 100; 72 L. Ed. 801.

Where a state statute is challenged in the state court under the due process clause, the case is properly before the Supreme Court of the United States.

Miller v. Schoene (Va. 1928), 48 S. Ct. 246; 276 U. S. 272; 72 L. Ed. 568.

The statutory provisions sustaining the jurisdiction of the U. S. Supreme Court in this case is found in section 344 of U. S. Code, Annotated, Chap. 9, Title 28 (Judicial Code, section 237, amended).

We wish to apologize to this Honorable Court for the crude way in which this matter is presented in this brief, but Your Honorable Court advanced this case for hearing and we did not receive notice of the advancement until November 6, 1933. At the present writing we have not yet received a copy of the record, and have not been able to refer to the book and page thereof, but the record is very small, and I hope this omission will not cause the court inconvenience. In order that appellee may have ample time to file his brief, we were required to rush the preparation of this brief, and it is not as we would have presented it, had we had more time.

In conclusion, we respectfully submit that the decisions set forth in this brief, particularly those of the United States Supreme Court, show conclusively that section 9a of the Alien Land Act of California and section 1983 of the Code of Civil Procedure are unconstitutional and void, and that defendants were not accorded due process of law. The judgment and the decision of the Supreme Court of the state of California should therefore be reversed.

Respectfully submitted,

J. MARION WRIGHT,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS AND STATEMENT OPPOSING JURISDICTION.

U. S. WEBB,
FRANK ENGLISH,
JAMES S. HOWIE,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO THE SUPREME COURT OF THE UNITED STATES TO DISMISS ORDER BY THE SUPREME COURT OF THE STATE OF CALIFORNIA ALLOWING APPEAL.

Filed August 26, 1933.

Comes now the People of the State of California, plaintiff and respondent, by U. S. Webb, Attorney General of the State of California, and Frank English, Deputy Attorney General and James S. Howie, Deputy Attorney General, and moves the Supreme Court of the United States to dismiss and quash the order of the Supreme Court of the State of California purporting to allow an appeal herein.

This motion is based upon the want of jurisdiction of the Supreme Court of the United States because the paper purporting to allow such appeal is irregular and insufficient and not supported by sufficient grounds for appeal, on the grounds stated in the annexed statement of plaintiff and respondent disclosing grounds making against the jurisdiction of the United States Supreme Court as asserted by appellants, and also because the question upon which it is claimed that jurisdiction of the United States Supreme Court depends is so frivolous as not to need further argument, and further because the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

U. S. WEBB,
Attorney General, State of California.
FRANK ENGLISH,
Deputy Attorney General.
JAMES S. HOWIE,
Deputy Attorney General.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON AND H. DOI, APPELLANTS,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OF PLAINTIFF AND RESPONDENT DISCLOSING GROUNDS MAKING AGAINST THE JURISDICTION OF THE UNITED STATES SUPREME COURT AS ASSERTED BY APPELLANTS.

(Annexed hereto is copy of Decision of the California Supreme Court in the above case.)

I.

Noncompliance With Rule of Court.

Rule 12, paragraph 1 of the Supreme Court of the United States provides, in part, as follows:

"Upon the presentation of a petition for the allow-
"ance of an appeal to this court, • • • there shall

"be presented by the applicant a separate typewritten "statement particularly disclosing *the basis upon which "it is contended that this court has jurisdiction* upon "appeal to review the judgment or decree in question. "The statement shall refer distinctly (*a*) *to the statu-"tory provision believed to sustain the jurisdiction* "* * *. The statement * * * shall cite the cases "believed to sustain the jurisdiction."

In the instant case the appellants have utterly failed to comply with the above rules of this Court. In their statement of the grounds of jurisdiction they state that:

"The statutory provision believed to sustain the "jurisdiction of this Court is the Fourteenth Amend-"ment to the Constitution of the United States" (Page 2).

It will readily be observed upon a reading of the Fourteenth Amendment to the Constitution of the United States that it does not refer to the Supreme Court of the United States or to its jurisdiction. No mention is made as to the kind or type of case concerning which the United States Supreme Court will entertain jurisdiction.

What the appellants really mean is that the State statute involved in this case violates the Fourteenth Amendment, and it is this constitutional provision that is violated.

But more than the mere presence of a Federal constitutional provision must exist before the Supreme Court of the United States will entertain jurisdiction of a case from a State supreme court. There must exist statutory or constitutional authority for the United States Supreme Court to hear and determine such a case, and there must exist facts to bring the case within the statutory or constitutional authority. And whereas the appellants have stated grounds attempting to show that their facts come within *some* statutory or constitutional authority, they have

not set forth the particular statutory or constituional provision within which they seek to come. That is one of the specific requirements of the rules of this Court as set forth in Rule 12, Paragraph 1, Subdivision (*a*).

In the absence of any showing on the part of the appellants that any statutory or constitutional provision exists which permits the Supreme Court of the United States to take jurisdiction of this particular type of case decided by a State supreme court, it must be deemed that none exists and that therefore this Court has no jurisdiction. The appeal, then, must be dismissed.

Further, Rule 12, paragraph 1, provides that the jurisdictional statement of the appellant must cite "cases believed to *sustain the jurisdiction.*"

The word "jurisdiction" has a well-defined meaning, and it is: The power "to hear and determine" a cause. It does not mean, however, as appellants seem to believe, the manner in which the court will pass upon a particular point of law, when the point of law is properly before the court.

In this case the appellants have set forth a long line of cases purporting to show this Court the *basis for entertaining jurisdiction.* But not one of these cases bears upon the question of *jurisdiction.* They all purport to pass upon the merits of the case, and not upon the preliminary question of the right to entertain jurisdiction to hear the cause on the merits.

Again, appellants have failed to comply with the rules of this Court, and again, in the absence of any showing on the appellants' part that this Court has jurisdiction of this type of case, it should be held that the court has no jurisdiction and the appeal be dismissed.

II.

No Substantial Federal Question Presented.

In the second place, the question upon which it is claimed that jurisdiction depends is so frivolous as not to need further argument. Further, the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The statutes of California about which complaint is made are as follows:

1. Section 9(*a*) of the Alien Land Act, as amended by Chapter 528 of the Statutes of 1927 (Statutes of 1927, page 880), and

2. Section 1983 of the Code of Civil Procedure of the State of California as amended by Chapter 244 of the Statutes of 1927 (Statutes of 1927, page 434).

For the double purpose of accurately presenting these statutes to this Court and of eliminating certain editorial notes, set forth by the appellants in their jurisdictional statement, at pages 2 and 3, which editorial notes form no part of the statute as enacted, we set forth the statues as passed by the Legislature of California in 1927.

That portion of Chapter 528 which enacts Section 9(*a*) reads as follows:

"CHAPTER 528.

"An act to amend an act entitled 'An act relating to "the rights, powers and disabilities of aliens and "of certain companies, associations and corpora-"tions with respect to property in this state, pro-"viding for escheats in certain cases, prescribing "the procedure therein, requiring reports of cer-"tain property holders to facilitate the enforce-"ment of this act, prescribing penalties for viola-"tion of the provisions hereof, and repealing all

"acts or parts of acts inconsistent or in conflict "herewith,' submitted by the initiative and adopted "and approved by the electors of the State of Cali- "fornia, November 2, 1920, as amended, by adding "two new sections numbered nine *a* and nine *b*.

"(Approved by the Governor May 16, 1927. In "effect July 29, 1927.)

"*The people of the State of California do enact as "follows:*

"SECTION 1. A new section to be known as section "9*a* is hereby added to the act cited in the title thereof "and to read as follows:

"SEC. 9*a*. In any action or proceeding, civil or "criminal, by the State of California, or the people "thereof, under any of the provisions of this act, "when the proof introduced by the state, or the people "thereof, establishes the acquisition, possession, en- "joyment, use, cultivation, occupation, or transfer- "ring of real property or any interest therein, or the "having in whole or in part the beneficial use thereof "by any defendant, or any of such fact, and the com- "plaint, indictment or information alleges the alien- "age and ineligibility to United States citizenship of "such defendant, the burden of proving citizenship or "eligibility to citizenship shall thereupon devolve "upon such defendant."

"CHAPTER 244.

"An act to add a new section to the Code of Civil "Procedure, to be numbered one thousand nine "hundred eighty-three, relating to the burden of "proof in certain cases.

"(Approved by the Governor April 25, 1927. In "effect July 29, 1927.)

"*The people of the State of California do enact as "follows:*

"SECTION 1. A new section is hereby added to the "Code of Civil Procedure to be numbered 1983 and "to read as follows:

"1983. Whenever in any action or proceeding, civil "or criminal, brought by, or in the name of, the state "or the people thereof, or by or in the name of any "political subdivision or agency of the state, or by "any public board or officer on behalf of any thereof, "to enforce any law which denies any right, privilege "or license to any person not a citizen of the United "States, or not eligible to become such citizen, or to a "person not a citizen or resident of this state, and "whenever in any action or proceeding in which the "state or any political subdivision or agency thereof, "or any public board or officer acting on behalf thereof, "is or becomes a party, it is alleged in the pleading "therein filed on behalf of the state, the people thereof, "political subdivision or agency, or of such board or "officer, that such right, privilege or license has been "exercised by a person not a citizen of the United "States, or not eligible to become such citizen, or by "a person not a citizen or resident of this state, as "the case may be, the burden shall be upon the party "for or on whose behalf such pleading was filed to "establish the fact that such right, privilege or license "was exercised by the person alleged to have exercised "the same, and upon such fact being so established the "burden shall be upon such person, or upon any per- "son, firm or corporation claiming under or through "the exercise of such right, privilege or license, to "establish the fact that the person alleged to have ex- "ercised such right, privilege or license was, at the "time of so exercising the same, a citizen of the United "States, or eligible to become such citizen, or was a "citizen or resident of this state, as the case may re- "quire, and was at said time legally entitled to exercise "such right, privilege or license."

As will be observed, the above statutes of California merely establish a rule of convenience by throwing upon

a defendant the burden of proving facts peculiarly within his own knowledge. Such a rule of convenience has long been recognized by the highest courts of both this country and England.

16 Corpus Juris, page 530, Section 998;
5 Wigmore on Evidence (2nd Ed.), Section 2486;
1 Greenleaf on Evidence (14th Ed.), Section 79;

The *King* v. *Turner*, 5 Maule & S. 206, which is the leading common-law case.

People v. *Velasquez*, 70 Cal. App. 362, at 366 ff;
People v. *Osaki*, 209 Cal. 169;
8 California Jurisprudence, Section 148.

Such a rule of convenience in the law pertaining to evidence in no way infringes upon any constitutional guarantee afforded the defendant by the Fourteenth Amedment to the Constitution of the United States.

In *Casey* v. *United States*, 276 U. S. 413, Mr. Justice Holmes, in delivering the opinion of the Court, stated at page 418:

> "It is consistent with all the constitutional protec-
> "tions of accused men to throw on them the burden of
> "proving facts peculiarly within their knowledge and
> "hidden from discovery by the Government." 4 Wig-
> more, Evidence, Sec. 2486.

See also *Luria* v. *United States*, 231 U. S. 9 at 25, where the same principle was recognized.

It is a simple matter for a defendant to prove his birth place, and whether in fact he has been naturalized as a United States citizen. As a matter of practicality it is in most cases absolutely impossible for a State to prove where a defendant was born, or to assume the burden of examining the naturalization records of every State in the Union in order to show that, in fact, any given defendant has

never been naturalized. This knowledge is peculiarly within the possession of the defendant himself, and it is a far cry to say that in order to make workable such a statute as we have in the Alien Land Law of California, due process of law is being denied the defendant. Our Alien Land Law has been sustained as to its general constitutional validity by the highest court of the State of California and by the Federal courts, and also by the United States Supreme Court. This successful litigation, so far as the State of California is concerned, will be of no real benefit if the State finds itself in the position of not being able as a practical matter to enforce the statute so approved of by these various courts.

Furthermore, the type of statute here involved is merely a rule of evidence, creating a presumption that is *rebuttable*, and regulating the burden of proof which may be met by evidence for the defense. The alien is in no way barred from establishing a complete defense. He is free to rebut the presumption created.

That a State may prescribe a rule of evidence that establishes a *prima facie* case and thus cast the further burden of meeting that *prima facie* case and proving facts making against such case, has been repeatedly sanctioned by this Court, which has held that this does not violate the Fourteenth Amendment to the Constitution of the United States.

The whole matter is concisely stated in *Hawes* v. *Georgia*, 258 U. S. 1, wherein Mr. Justice McKenna, in speaking for this Court, stated at page 4:

> "It has been decided, as counsel concede, that the "legislature may make one fact *prima facie* evidence "of another, and it is certainly within the established "power of a State to prescribe the evidence which is to "be received in the courts of its own government. "*Adams* v. *New York*, 192 U. S. 585, 588.

"In *Hawkins* v. *Bleakly*, 243 U. S. 210, 214, it is said,
"'the establishment of presumptions, and of rules
"'respecting the burden of proof, is clearly within the
"'domain of the state governments, and that a provi-
"'sion of this character, not unreasonable in itself
"'and not conclusive of the rights of the party, does
"'not constitute a denial of due process of law. *Mo-*
"'*bile, Jackson & Kansas City R. R. Co.* v. *Turnip-*
"'*seed*, 219 U. S. 35, 42.'"

So also in *Mobile, etc. Ry. Co.* v. *Turnipseed*, 219 U. S. 35, Mr. Justice Lurton, in speaking for this Court, stated at page 43:

"If a legislative provision not unreasonable in itself
"prescribing a rule of evidence, in *either criminal* or
"civil cases, does not shut out from the party affected
"a reasonable opportunity to submit to the jury in his
"defense all of the facts bearing upon the issue, there
"is no ground for holding that due process of law has
"been denied him." (Italics supplied.)

See also the following cases for further expressions on the same point by this Court:

Fong Ting v. *United States*, 149 U. S. 698, at 729;
Lindsley v. *Natural Carbonic Gas Co.*, 220 U. S. 61, at 81–83;
Luria v. *United States*, 231 U. S. 9, at 25;
Hawkins v. *Bleakly*, 243 U. S. 210, at 213-214;
Cockrill v. *California*, 268 U. S. 258, at 261;
Casey v. *United States*, 276 U. S. 413, at 418;
Bandini Co. v. *Superior Court*, 284 U. S. 8, at 18–19;
West Virginia Coal Co. v. *Charles*, 254 Fed. 379;
Logan & Bryan v. *Postal Telegraph Co.*, 157 Fed. 570;
People v. *Mallon*, 222 N. Y. 456, 119 N. E. 109.

"Furthermore, there are presumptions that are not
"evidence in a proper sense, but simply regulations of
"the burden of proof."
Casey v. *United States*, 276 U. S. 413, at 418.

The question, then, as to whether such a rule of convenience as here involved deprives a defendant of due process of law, having been repeatedly decided by this Court and others with the conclusion that due process is not violated, the question is no longer open to argument by this and other Courts, and therefore, at this time it is frivolous and unsubstantial. There being no question of merit presented, the appeal should be dismissed.

Equitable Life v. *Brown,* 187 U. S. 308, at 311;
King v. *West Virginia,* 216 U. S. 92, at 99–100;
Tidal Oil Co. v. *Flanagan,* 263 U. S. 444, at 455–456, and
Fleming v. *Fleming,* 263 U. S. 444.

III.

Decision of State Supreme Court Conclusive in Matters of Construction of State Statutes and Constitution.

It will also be observed that some of the assignments of error filed by the appellants are devoted to an attempt to have this Court review certain interpretations and constructions placed upon the statutes by the State supreme court. The following assignments of error are of this character:

X, XI, XVI, and XIX.

And in some of these assignments of error the statutes and the decision of the Supreme Court of California in respect thereto are not accurately quoted.

It has long been held by this Court that mere interpretations or constructions of State statutes afford no basis for an appeal to this Court. This Court is bound by the construction and interpretation placed upon such statutes by the State supreme court.

In *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court, speaking through Mr. Justice Sutherland, stated at pages 32 and 33:

> "Under the settled rule of this Court, declared so "frequently and uniformly as to have become axio- "matic, we must accept this decision of the highest "court of the State fixing the meaning of the State "legislation, as though such meaning had been spe- "cifically expressed therein. See, for example, *Leffing- "well* v. *Warren*, 2 Black 599, 603; *Green* v. *Lessee of "Neal*, 6 Pet. 291, 297-300. And we follow the State "construction even though it may not agree with our "own opinion. *Supervisors* v. *United States*, 18 Wall. "71, 82. *Shelby* v. *Guy*, 11 Wheat. 361, 367; *Tioga "R. R.* v. *Blossburg & Corning R. R.*, 20 Wall. 137, "143."

See also:

Hurwitz v. *North*, 271 U. S. 40, at 41; and
Keith v. *Johnson*, 271 U. S. 1 at 8, among many other cases.

Furthermore, in Assignments of Error VI, VII, VIII, IX, and XIII, and in their jurisdictional statement at page 6, the appellants state that the State constitution has been violated by the enactment of statutes herein involved. Such a question does not present anything for review by the Supreme Court of the United States.

The general rule is stated in Hughes on Federal Practice, Volume 5, Section 3242, pages 331–332:

> "The question whether or not a State statute con- "flicts with the Constitution of the State does not pre- "sent any question for review by the Supreme Court "of the United States. That court will regard such a "question as settled by the highest court of the State. "And so whether the State Legislature conforms to "the State Constitution in the enactment of certain

"State statutes, is not a Federal question, but is a ques-
"tion upon which the determination of the State court
"is final" (citing cases).

For the foregoing reasons it is respectfully submitted that not only have the appellants not shown any statutory or constitutional authority for this Court to entertain jurisdiction of this cause as required by the rules of this Court, but also the appellants have not presented a substantial Federal question which is open for decision at the present time. The appeal, therefore, should be dismissed.

U. S. WEBB,
Attorney General, State of California,
FRANK ENGLISH,
Deputy Attorney General,
JAMES S. HOWIE,
Deputy Attorney General,
Attorneys for Plaintiff and Respondent.

EXHIBIT "A."

Decision of the Supreme Court of the State of California in the Case of People of the State of California vs. George Morrison and H. Doi.

Crim. No. 3601. In Bank. June 1, 1933.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. GEORGE MORRISON and H. DOI, Defendants and Appellants.

[1] ALIEN LAND LAW—BURDEN OF PROOF—CONSTITUTIONAL LAW.—The provisions of section 9a of the Alien Land Act (Stats. 1927, p. 880), placing the burden of proving citizenship or eligibility to citizenship upon the defendant in any action, civil or criminal, by the state under the provisions of such act, when proof is introduced of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property, or interest therein, by any defendant, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, are valid, and the enactment of such section was a valid exercise of the power of the legislature.

Appeal by defendants from a judgment of the Superior Court of San Diego County, A. C. Finney, Judge, of conviction of conspiracy to violate the Alien Land Act and from an order denying a new trial. *Affirmed.* Curtis, J., *Dissents;* Shenk and Preston, J. J., *concurring.*

On hearing after judgment in District Court of Appeal, Fourth District (70 Cal. App. Dec. 488), *affirming* judgment of Superior Court of conviction of conspiracy to violate the Alien Land Act. Judgment of Superior Court *affirmed.* Curtis, J., *dissents;* Shenk and Preston, J. J., *concurring.*

For Appellants—W. K. Brown, Edgar B. Hervey, J. Marion Wright.

For Respondent—Thomas Whelan, District Attorney; John T. Holt, Deputy District Attorney; U. S. Webb, Attorney-General; Frank English, J. Charles Jones, James S. Howie, Deputies Attorney-General.

This cause was transferred to this court after decision by the District Court of Appeal, Fourth District, Barnard, P. J., writing the opinion affirming the judgment.

The defendants were jointly accused by indictment of the crime of conspiring to violate the Alien Land Act of this state. (Stats. 1921, p. lxxxiii; Stats. 1923, p. 1020; Stats. 1927, p. 881.) Section 13 of said initiative measure provides that the legislature may amend said measure in furtherance of its purpose. Section 9a, which appellants claim violates the due process clause of the federal Constitution and denies to them equal protection of the law, was adopted as an amendment of said initiative measure by the legislature of 1927. (Stats. 1927, p. 880.) It provides as follows:

"In any action or proceeding, civil or criminal, by the state of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant."

Section 1983, Code of Civil Procedure, which was passed by the same legislature that amended the Alien Land Act in the respect above set forth, prescribes as a rule of evidence that whenever ineligibility to citizenship is alleged in a civil or criminal proceeding brought to enforce any law which denies any right, privilege or license to any person not a citizen or not eligible to become a citizen of the United States, the burden rests upon the state or people to establish that such right, privilege or license was exercised by the person so alleged to have exercised the same, and upon

such facts being so established the burden shall be upon the person claiming the right to exercise such right, privilege or license to show that at the time he exercised said rights he was a citizen of the United States or eligible to become such citizen. That section contains nothing of substance so far as the question is here involved that is not found in the amendment of the Alien Land Act of 1927. The only purpose it can serve is to make more emphatic the intention of the legislature to establish a rule of evidence which shall be applied in the class of cases of which the instant case is unquestionably one.

The indictment under which appellants were convicted alleged that they wilfully, unlawfully and feloniously combined and conspired by unlawful means and devices to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes, by the defendant Doi and for his use and benefit of certain described real property situate in the county of San Diego, which real property is alleged to be agricultural in character. It is alleged that the defendant Doi was and is an alien ineligible to citizenship under the laws of the United States, and that he is a citizen and subject of the empire of Japan and not authorized by law or treaty to acquire, enjoy, occupy or to have any beneficial interest in any real property in this state for agricultural purposes. It is also alleged that in furtherance of said conspiracy, and for the purpose of accomplishing and effecting the purposes and objects thereof, the defendant Morrison put the defendant Doi into possession of the agricultural land described, and permitted, aided and encouraged him to take possession thereof and to use, enjoy, cultivate and occupy the same, and that the defendant Doi took possession of said land, used, enjoyed, cultivated and occupied the same and raised and harvested crops thereon for his own use and benefit.

Trial by jury was waived and the action was tried before the court. The only evidence introduced consisted of the following stipulation: "It is stipulated that the defendant George Morrison is, and was at all times mentioned in the indictment, a native-born citizen of the United States of America, and lessee of the land described in the said

amended indictment; that said land is agricultural land, and at all times mentioned in said amended indictment has been used exclusively for agricultural purposes; that on or about the 27th day of August, 1931, the said George Morrison did knowingly and wilfully combine, confederate and agree with one H. Doi to bring about and accomplish the possession, enjoyment, use, cultivation and occupancy for agricultural purposes by said H. Doi, and thereafter to continuously keep and maintain the said H. Doi in such possession, enjoyment, use, cultivation and occupancy, for agricultural purposes, and to the use and beneficial interest of the said H. Doi, of all of the said land, and thereafter, and pursuant to said confederation, combination and agreement, and as a result thereof, and in furtherance of, and to accomplish and effect the purposes and objects thereof, the said George Morrison did put the said H. Doi into possession of, and did permit, aid and encourage the said H. Doi to go into possession of, and to use, enjoy, cultivate and occupy the said land, and said H. Doi, did go into possession of said land, and did use, enjoy, cultivate and occupy the same, and did raise and harvest crops thereon, for the use and benefit of said defendants and each of them."

By the above stipulation it will be seen that the agricultural character of the lands and the execution of the lease and the entry into the possession thereof by defendant H. Doi (alleged to be a citizen and subject of the empire of Japan) and all facts necessary under the Alien Land Act to sustain a conviction except ineligibility are admitted. The defendants having failed to offer any evidence touching the qualification of Doi to exercise the rights of citizenship, or to meet the burden cast upon him, were adjudged guilty as charged, and released on probation. This appeal is from the judgment of conviction and order denying a new trial.

[1] Appellants' sole attack is made upon that portion of the decision in the case of *People* v. *Osaki*, 209 Cal. 169, which sustains the power of the legislature to cast the burden upon aliens charged in the manner provided by the acts in question to prove their eligibility to own, possess or occupy agricultural land. While it was pointed out in that case that the evidence produced by the prosecution was

sufficient of itself to show that the accused was an ineligible alien without the necessity of invoking the aid of the burden of proof provisions of said amendment to the Alien Land Act and said statutes, the validity of said burden of proof provisions was nevertheless brought into question and considered by us at great length. In fact, by far the greater portion of the decision was given to a consideration of the validity of said sections which cast the burden of proof upon the accused. In our discussion of the question here pressed by appellants we said:

"We are of the view that the better reason supports the conclusion that the burden in cases involving questions of naturalization and alienage has always been upon the defendant, who has intimate and previous knowledge of the fact."

Again we said:

"It is not intended by what we have said to extend the rule of convenience or burden of proof to common-law crimes generally designated as malum in se nor to all crimes malum prohibitum. We go no further than to apply the rule to the particular situation in accordance with the express mandate of said amendments."

Counsel for appellants recognize the relevancy and application of the authorities cited in the Osaki case to the instant case, and asks that we disapprove of the rule therein adopted and apply the doctrine announced in *People* v. *Quarez,* 196 Cal. 404. That case leans heavily upon *People* v. *Frey,* 165 Cal. 140, which, as pointed out in the Osaki case, was adopted by a bare majority of the court. *People* v. *Quarez* and *People* v. *Frey* and many other cases of our own and other jurisdictions were exhaustively considered in the Osaki case, and counsel in the instant case has presented no important authorities or additional arguments which were not drawn to our attention in the Osaki case. Both the Quarez and Frey cases recognize the rule ab inconvenienti, commonly known as the rule of necessity or convenience, but seek to limit its application to the prosecution of persons charged with the violation of statutes regu-

lating the practice of medicine and other professions and certain callings which provide that a license shall first be obtained before any person may engage in the practice of said professions or callings. The rule of convenience or necessity is of common law origin and was a rule of evidence as early as 1816, a period long prior to the adoption of the modern system requiring persons to obtain a license before they may engage in particular callings, which system has become quite universal as conducive to public health and safety during the present and latter part of the past century.

Chief Justice Ellenborough recognized the rule more than a century ago in the case of *King* v. *Turner*, 5 Maule and Selwyn's Reports, 206. This early case did not involve the question of licensing a calling, but was bottomed on the want of qualification on the part of the accused for having game in his possession. The identical principle is presented in the instant case, to-wit, a want of qualification to enjoy an exclusive privilege of citizenship. Lord Ellenborough states the question as being one upon whom the onus probandi lies; whether it lies upon the person who affirms a *qualification* to prove the affirmative, or upon the prosecutor who denies any qualification to prove the negative. He observes that there were about ten different heads of qualification enumerated in the statute to which the proof might be applied, and, according to the argument made, every person who laid an information as to qualification of the accused would be bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. "The argument," the eminent jurist remarks, "really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, non liquet, but that the defendant may be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the statute of Anne in effect a prohibition

on every person to kill game, unless he brings himself within some one of the qualifications allowed by law, the proof of which is easy on the one side, but impossible on the other?"

The great jurist makes reference to Lord Mansfield in *Spiers* v. *Parker,* and states that he finds him laying down the rule that in actions upon the game laws, and he saw no good reason why the rule should not be applied to informations as well as actions, the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. Continuing he said: "The same was said by Heath, J., in *Jelfs* v. *Ballard;* and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of the opinion that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute is sufficient, without going on to negative, by the evidence, those qualifications."

Bayley, J., in a concurring opinion, said that no hardship was cast upon the defendant by the above rule because the defendant must be presumed to know his own qualification and to be able to prove it.

Holrod, J., concurring, said that it was a general rule that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. He holds that where it is shown that qualification to exercise a right or privilege is peculiarly within the knowledge of the person assuming to exercise the same, the burden is on such person to prove it.

It will be observed that the rule thus early recognized was not confined to medical cases, but to all of that class of cases in which the *qualification* of the person to exercise a privilege was the issue. The question before us is one in which qualification is the crux of the proposition. The books are replete with decisions which follow the rule early announced by Chief Justice Ellenborough and concurred in by his associates. Justice Story, in *United States* v. *Hayward,* 26 Fed. Cas. 240 (No. 15,336), recognized the rule at length in a case wherein the question arose as to the

necessity of negativing the neutrality of a vessel in which goods were brought into this country. In his consideration of negative allegations he holds the reasonable rule is that the burden of proof shall rest upon the party who holds the affirmative; and especially where the facts are peculiarly within his privity and cognizance. In *Casey* v. *United States*, 276 U. S. 413, 72 L. Ed. 632, 48 Sup. Ct. Rep. 373, involving the illegal possession of morphine, Mr. Justice Holmes said: "It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government." (1 Greenleaf on Evidence, sec. 79; 4 Wigmore on Evidence, sec. 2486; *Yee Hem* v. *United States*, 268 U. S. 178, 69 L. Ed. 904; *Mobile etc. R. R.* v. *Turnipseed*, 219 U. S. 35; *State* v. *Miller*, 182 Mo. 370, 81 S. W. 867; *State* v. *Abbey*, 29 Vt. 60, 67 Am. Dec. 754; *People* v. *Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402; *People* v. *Goscinsky*, 52 Cal. App. 62; *People* v. *T. Wah Hing*, 47 Cal. App. 327.) The questions of *corpus delicti* and compelling the accused to be a witness against himself are fully discussed in a number of the cases cited in *People* v. *Osaki*, supra, and it is held that no right of the accused is denied or abridged by the application of the rule of convenience in cases where qualification is made the test of the right to enjoy a certain privilege, and the qualification upon which he asserts his right is peculiarly within the knowledge of the person exercising such privilege.

People v. *Velasquez*, 70 Cal. App. 362, 233 Pac. 359, Curtis J., writing the opinion, held contrary to *People* v. *Quarez, supra*, and we are of the view that the treatment of and the application of the rule of convenience made by the District Court of Appeal is sound in reason and is sustained by the greater weight of authority. It held that the accused had absolute knowledge as to whether he was a naturalized citizen, and the burden was on him to offer his proof. If the People in this case should be required to prove the negative the enforcement of the law would be defeated by imposing upon the People the impossible task of making a thorough and painstaking search of the entire

United States and its dependencies in probably a vain effort to establish the non-existence of a naturalization record. This case was published about the time that the Quarez decision was rendered. The first legislature that convened after the Quarez decision became the law, in an effort to supply the ground upon which a contrary decision might rest, adopted the amendment and statutes now before us casting the burden of proof upon persons whose right to exercise certain privileges granted only to citizens may be challenged upon the grounds of alienage, as in said statutes provided.

That it is competent for the state in the exercise of its sovereign power to reserve the ownership, occupancy and control of its agricultural lands for the benefit of its citizens or those eligible to become such, and that it may as a means of determining such eligibility when it is drawn into question by an appropriate proceeding cast upon the person claiming or assuming the right to own, occupy or control said land, the burden of proving his eligibility, are propositions that are entrenched in reason and supported by the great weight of eminent authority, and cannot be seriously questioned.

Medical license cases and liquor cases furnish a fertile field for the application of the rule of convenience or necessity. But it will be found upon an examination of the cases that the rule has been applied to cases of bigamy, relationships, the right to take game, possession of opium, questions of neutrality, and in fact generally to all cases of qualification where the right to enjoy a privilege is peculiarly within the knowledge of the person exercising such privilege, and not within the knowledge of the state which challenges the right by negative allegations. No case can easily be imagined which so aptly justifies the application of the rule of necessity and convenience as do the facts and circumstances which constitute the basis of the instant case. It would be beyond reason to require the state to search the records of every city, parish and county of the nation in proof of a negative when the question of qualification is peculiarly within the knowledge of the person who asserts

the right to enjoy a privilege which attaches to citizenship alone.

We have given no special consideration to section 9b of said amendment to the Alien Land Act, for the dual reason that it is not material to the issue involved in the instant case, and its effect was fully considered in the Osaki case. That section provides that when the proof shows the defendant to be a member of a race ineligible to citizenship under the naturalization laws of the United States, the burden of proving citizenship or eligibility as a defense shall thereupon devolve upon such defendant. It is specially provided by said section that it shall not modify, limit or affect in any manner the provisions of said section 9a. Said section 9b was doubtless adopted as a measure offering some assistance in the way of making the act effective if section 9a should for any reason fail.

In the prosecution of cases of this class the burden of proof is upon the prosecution to affirmatively establish every element constituting the offense, save the want of eligibility on the part of the accused. There is nothing unreasonable or unjust in the rule which requires the accused to prove his eligibility. The legislature has determined that the safety and welfare of the state depend largely upon the ownership of its agricultural land remaining in the hands of its citizens, or those eligible to become such. The United States Supreme Court in a number of decisions has approved this policy. The legislature by statutory enactment has cast the burden upon those whose eligibility is challenged in the name of state of proving such eligibility. It is entirely competent for it to do so.

The judgment is affirmed.

SEAWELL, *J.*

We concur:

TYLER, *J.* pro tem.
LANGDON, *J.*
WASTE, *C. J.*

DISSENTING OPINION.

I dissent. The crime charged against the defendants consists of two elements, (1) the alienage and ineligibility

to citizenship of H. Doi, and (2) the possession of agricultural lands by said defendant. The second of these two elements was proven, but there was no evidence whatever in support of the first element—alienage and ineligibility to citizenship of H. Doi. Under section 9*a* of the Alien Land Act as the alienage and ineligibility to citizenship was alleged in the indictment the burden of proving citizenship or eligibility to citizenship was cast upon the defendants. The conviction of the defendants must stand, therefore, if this section of the Alien Land Act is a valid exercise of legislative power. The majority opinion sustains the validity of the law in question. In the first place it is apparent that there is a marked distinction between the instant case and the case of *People* v. *Osaki*, 209 Cal. 169. In that case there was direct proof, and this fact was emphasized throughout the opinion, not only that the defendant Osaki was in the possession of agricultural lands, but also that he was a member of the Japanese race. Under Section 9*b* of the Alien Land Act proof of these facts creates "a prima facie presumption of ineligibility to citizenship." The constitutionality of Section 9*b* of said Act is not questioned. Under that section it is necessary to prove two facts: First, that the defendant is in possession of agricultural lands of this State, and second, that he is a member of a race ineligible to citizenship. Under section 9*a*, however, only one of these facts is required to be proven, and that is that the defendant is in possession of agricultural lands of this State. From this one fact under said section the presumption may be drawn that the defendant is a member of a race ineligible to citizenship and that he is also ineligible to citizenship. Referring back to section 9*b* of the act and the legislative presumption therein created, we find that upon proof that the defendant is a *member* of a *race* ineligible to citizenship, the presumption arises that he is ineligible to citizenship. It is clear that there is a reasonable and rational connection between the fact thus proven and the fact presumed. It is reasonably probable that a member of the Japanese race, for instance, was born in Japan and is, therefore, ineligible to citizenship under the laws of this country. But under section 9*a* of the act, the only fact

necessary to prove is that the defendant is in possession of agricultural lands and the burden of proving that he is ineligible to citizenship is then cast upon the defendant, or which amounts to the same thing, the defendant is then presumed to be ineligible to citizenship. From the foregoing statement, I think it clearly appears that there is no rational or reasonable connection or relation between the fact proven and the fact presumed. The fact that a person is in possession of agricultural lands of the State does not in the least tend to prove that he is a member of any particular race, much less of a race, the members of which are denied citizenship under our laws. The validity of legislation creating presumptions similar to that provided for by section 9*a* of said act has frequently been before the courts of this and other jurisdictions with the result that it has uniformly been declared invalid. One of the leading cases upon this subject is that of *McFarland* v. *American Sugar Refining Co.*, 241 U. S. 79. In that case the legislature of Louisiana had enacted a statute which purported to impose penalties for monopolies and conspiracy in relation to trade. By this statute it was provided that: "Any person engaged in the business of refining sugar within this State who shall systematically pay in Louisiana a less price for sugar than he pays in any other State, shall be *prima facie* presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine * * *." The Supreme Court of the United States held that this presumption was invalid as being in violation of the Fourteenth Amendment of the Constitution, and speaking through Mr. Justice Holmes said: "As to the presumptions, of course the legislature may go a good way in raising one or in changing the burden of proof, but there are limits. It is 'essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate'. (*Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35, 43, 55 L. ed. 78, 80, 32 L. R. A. [N. S.] 226, 31 Sup. Ct. Rep. 136, Ann. Cas. 1912A, 463, 2 N. C. C. A. 243.) The presumption created here has no relation in experience to general facts."

In *O'Neill* v. *United States*, 19 Fed. (2d) 322, the defendant was accused with the violation of the Harrison Anti-Narcotic Act. In that case the defendant was convicted of the offense of selling drugs without paying the special tax provided by the statute. The prosecution relied upon the prima facie presumption which was claimed to arise under the statute from the possession of unstamped drugs. In discussing this presumption, the court said: "The general principle is well recognized that even in criminal prosecutions, congress or a state legislature may with certain limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (12 *C. J.*, p. 823, sec. 285.) The limitations are these: There must be some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of the other facts must not be so unreasonable or unnatural as to be a purely arbitrary mandate * * *." Further on in the opinion, the court also said: "In our opinion, congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the first penal provision of section 1."

In the case of *Simpkins* v. *State*, 249 Pac. 168, the court had under consideration a statute of Oklahoma providing that if a person driving an automobile had on or about his person any intoxicating liquors that fact would constitute *prima facie* evidence of such person having driven while intoxicated. After discussing the constitutional limitations as to legislation of that character the court said: "It is apparent that the presumption here created violates this limitation, since, in order to draw the conclusion of intoxication from the fact of the driver of an automobile having intoxicating liquors on his person or in said vehicle, there must first be the inference that the driver had used the intoxicants, and the further inference that he had used them to such an extent that he was under the influence thereof to the extent of intoxication. The presumption of intoxication fixed by the statute is also contrary to the fundamental requirement that the inference or presumption of intoxica-

tion arising from the possession of the person or in the vehicle of liquors must be a probable or natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote."

To the same effect are two recent decisions of the Supreme Court of the United States: *Manley* v. *Georgia*, 279 U. S. 1, where the court held unconstitutional a statute of Georgia which allowed a conviction of fraud upon mere proof of insolvency, on the ground that the statutory presumption was not rational and that the connection between the fact proved and that presumed was not rational; and *Western & Atlantic Railroad* v. *Henderson*, 279 U. S. 639, holding unconstitutional a statute providing for a shifting of the burden of proof on the issue of negligence upon the mere proof of a collision upon the ground that a statute cannot provide for the shifting of the burden of proof on the basis of a presumption which is arbitrary and irrational.

Many other authorities to the same effect might be cited but we deem the above sufficient for our present purpose. These cases uniformly hold that in order to sustain such a legislative presumption as that created by section 9a of said act, it is absolutely necessary that there be some rational or reasonable connection between the fact proven and the fact presumed. In the present case there is no semblance of such a connection. The mere fact that a defendant is brought into court and proof is made that he is using or is in possession of real property susceptible of producing agricultural products is made the basis of a presumption that he is an alien ineligible to citizenship. There can be no possibility of any rational claim that the possession of land of that character by a defendant gives rise to any inference or presumption as to his alienage or citizenship. In at least some of the cases cited there may be said to be some connection, though slight, between the fact proven and the fact presumed. For instance, in the case of the driver of an automobile with intoxicating liquor in his possession, it might well be said that there is some slight although rather shadowy connection between the fact

that the accused had intoxicating liquor in his possession and the fact of his intoxication, yet the court held such legislative presumption to be invalid. But in the case before us there is not the slightest connection or relationship between possession of real property and the alienage or citizenship of the person in its possession. According to the unbroken line of authorities, a presumption created by statute and based upon proof of such an unconnected and unrelated fact cannot be sustained as a valid exercise of legislative power. (*State* v. *Lapointe*, 81 N. H. 227, 123 Atl. 692.)

CURTIS, *J.*

We concur:
SHENK, *J.*
PRESTON, *J.*

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"It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sect. 2486."

From opinion of Mr. Justice Holmes, in case of *Casey* vs. *United States,* 276 U. S. 413, at page 418.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1933

No. 487

GEORGE MORRISON and H. DOI,
Appellants,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Appellee.

Appeal from the Supreme Court of the State of California

BRIEF OF APPELLEE

Importance of this Case from the Standpoint of the State of California

Unless the State finally prevails in this case, several years of successful litigation concerning the State's Alien Land Act will prove of no avail.

From the *nisi prius* courts of California, to the State's highest court, our act has been construed and sustained.

In the United States Federal Courts, and in the United States Supreme Court, we have successfully met attacks on the constitutionality of this legislation which is so vital to the welfare of our people.

But of what avail is all this if now, the State, after doing all in its power to apply by statute the common sense rule of convenience which we here urge in the matter of proof, finds itself faced with an insurmountable barrier?

That barrier is the utter impossibility to prove the nativity or race of a defendant, and the further impossibility to prove non-naturalization. And it is a simple matter for the defendant himself, who has peculiar knowledge of the facts, to prove his nativity, his race, and his naturalization as a United States citizen if in fact he has been naturalized.

I

SECTION 9a OF THE CALIFORNIA ALIEN LAND LAW AND SECTION 1983 OF THE CODE OF CIVIL PROCEDURE OF THE STATE OF CALIFORNIA DO NOT DENY TO ANY PERSON DUE PROCESS OF LAW NOR THE EQUAL PROTECTION OF THE LAWS, NOR IN ANY WAY VIOLATE THE CONSTITUTION OF THE UNITED STATES OR THE CONSTITUTION OF THE STATE OF CALIFORNIA.

(See Statutes of California, 1927, pages 880 and 434.)

A. Statement of, and Discussion Concerning the "Rule of Convenience," Relied on By Appellee, and the

Other and Distinct Rule, Relied on by Appellants, Requiring a Rational Connection Between the Facts Proved and the Ultimate Fact Presumed.

We shall discuss the above indicated subject matters and then shall proceed to analyze each and every case cited by counsel for Appellants in his brief, to show that no one of them is in point in the matter of the issues before this court.

In urging that the State statutes in question are unconstitutional, appellants assert that by said provisions and by the decision of the State Supreme Court in this case, appellants proceeded against are denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

While in this brief we hereinafter refer to section 9a of the California Alien Land Law, we ask that the reference be considered as including section 1983 of the Code of Civil Procedure of the State of California.

That portion of Chapter 528 of the Statutes of California, 1927, which adds section 9a to the California Alien Land Act, reads as follows:

"CHAPTER 528.

An act to amend an act entitled 'An act relating to the rights, powers and disabilities of aliens and of certain companies, associations and corporations with respect to property in this State, providing for escheats in certain cases, prescribing the procedure therein, requiring

reports of certain property holders to facilitate the enforcement of this act, prescribing penalties for violation of the provisions hereof, and repealing all acts or parts of acts inconsistent or in conflict herewith,' submitted by the initiative and adopted and approved by the electors of the State of California, November 2, 1920, as amended, by adding two new sections numbered nine and nine b.

(Approved by the Governor May 16, 1927. In effect July 29, 1927.)

The people of the State of California do enact as follows:

SECTION 1. A new section to be known as section 9a is hereby added to the act cited in the title thereof and to read as follows:

Sec. 9a. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact, and the complaint, indictment or information alleges the alienage and ineligibility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant.'"

Chapter 244 of the same session of the Legislature,

adding section 1983 to the Code of Civil Procedure, reads as follows:

"CHAPTER 244.

An act to add a new section to the Code of Civil Procedure, to be numbered one thousand nine hundred eighty-three, relating to the burden of proof in certain cases.

(Approved by the Governor April 25, 1927. In effect July 29, 1927.)

The people of the State of California do enact as follows:

SECTION 1. A new section is hereby added to the Code of Civil Procedure to be numbered 1983 and to read as follows:

1983. Whenever in any action or proceeding, civil or criminal, brought by, or in the name of, the state or the people thereof, or by or in the name of any political subdivision or agency of the state, or by any public board or officer on behalf of any thereof, to enforce any law which denies any right, privilege or license to any person not a citizen of the United States, or not eligible to become such citizen, or to a person not a citizen or resident of this state, and whenever in any action or proceeding in which the state or any political subdivision or agency thereof, or any public board or officer acting on behalf thereof, is or becomes a party, it is alleged in the pleading therein filed on behalf of the state, the people thereof, political subdivision or agency, or of such board or officer, that such right, privilege or license has been exercised by a person not a citi-

> zen of the United States, or not eligible to become such citizen, or by a person not a citizen or resident of this state, as the case may be, the burden shall be upon the party for or on whose behalf such pleading was filed to establish the fact that such right, privilege or license was exercised by the person alleged to have exercised the same, and upon such fact being so established the burden shall be upon such person, or upon any person, firm or corporation claiming under or through the exercise of such right, privilege or license, to establish the fact that the person alleged to have exercised such right, privilege or license was, at the time of so exercising the same, a citizen of the United States, or eligible to become such citizen, or was a citizen or resident of this state, as the case may require, and was at said time legally entitled to exercise such right, privilege or license."

The above quotation, as also the quotation of the statutes in appellants' brief, is accurate. The quotation found at pages 2-3 of appellants' statement as to jurisdiction has some slight discrepancies. Counsel for appellants and the appellee stipulate as to this.

It is our contention that section 9a of the Alien Land Law merely invokes, in prosecutions had under its provisions, the "rule of convenience" as applied to proof. This so-called rule of convenience is generally defined as follows:

> "When the negative of an issue does not permit direct proof, or where the facts come more

immediately within the knowledge of the defendant, the *onus probandi* rests upon him."

That such a rule is merely a rule of evidence appears from many decisions of the Supreme Court of the United States. One of the leading cases on this subject is *Mobile etc. Railroad Co.* vs. *Turnipseed,* 219 U. S. 35, 5 Law Ed. 78.

See also *West Virginia Coal Company* vs. *Charles,* 254 Fed. 379, and *Logan & Bryan* vs. *Postal Telegraph Co.,* 157 Fed. 570. *People* vs. *Mallon,* 222 N. Y. 456; 119 N. E. 102, and *Fong Ting* vs. *United States,* 149 U. S. 698, 37 L. Ed. 905.

Viewing the provisions of section 9a under the foregoing authorities, it at once appears conclusive that the provisions of this section do not relate to nor affect any vested right. The provisions of this section 9a merely establish rules of evidence and therefore their purpose is only to regulate procedure. There is, of course, no vested right in any of the rules of evidence. Such rules may be changed at any time without destroying any vested right in so far as such rules do not deny to any person the right to be heard and to have his claims or his rights adjudicated.

As said in *Mobile etc. R. R. Co.* vs. *Turnipseed,* 219 U. S. 35, at 43:

"If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to sub-

mit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

This language is quoted favorably by the United States Supreme Court in *Luria* vs. *United States,* 231 U. S. 9, at page 26, and then this court adds after the quotation:

"Of like import are *Fong Yue Ting* vs. *United States,* 149 U. S. 698, 729; *Adams* vs. *New York,* 192 U. S. 585, 599; *Bailey* vs. *Alabama,* 219 U. S. 219, 238; *Lindsley* vs. *Natural Carbonic Gas Co.,* 220 U. S. 61, 81; *Reitler* vs. *Harris,* 223 U. S. 437, 441."

In the above cited case of *Luria* vs. *United States,* 231 U. S. 9, we have a review of a decree setting aside and canceling as fraudulently and illegally procured a certificate of citizenship theretofore issued to Luria. This was under the act of June 29, 1906 (34 Stats. 596, 601). Section 15 of this act made the taking up of a permanent residence in a foreign country shortly after naturalization a presumption rebuttable by proof to the contrary of intention not to reside permanently in the United States. The court held that the creation of this presumption was not a denial of due process of law.

While this is a civil case, and while there was a rational connection between the fact proved and the presumption reached, we refer to language found at

page 25 which we consider to be of interest to us in this discussion:

> "Objection is specially directed to the provision which declares that taking up a permanent residence in a foreign country within five years after the issuance of the certificate shall be considered prima facie evidence of a lack of intention to become a permanent citizen of the United States at the time of the application for citizenship, and that in the absence of countervailing evidence the same shall be sufficient to warrant the cancellation of the certificate as fraudulent. It will be observed that this provision prescribes a rule of evidence, not of substantive right. It goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome. If, in truth, it was his intention at the time of his application to reside permanently in the United States, and his subsequent residence in a foreign country was prompted by considerations which were consistent with that intention, he is at liberty to show it. *Not only so, but these are matters of which he possesses full, if not special, knowledge.*"
>
> (Italics supplied.)

With reference to the language used by the United States Supreme Court which we have emphasized in the above cases it is significant that the court used that language even though it was considering a statute which does include a provision expressing a rational connection between the fact proved and the fact presumed. The United States Supreme Court,

however, goes on to say that in addition, facts were peculiarly within the knowledge of a party and therefore the rule of convenience should be applied.

This would appear to indicate that the court considered that this was a reason sufficient unto itself for the rule of these different cases.

The presumption in our case is not one of evidentiary or probative effect, nor is it intended to be of that character. It is intended by the State, speaking through the Legislature, to regulate by this presumption the *order* of proof; in other words, the procedure, placing the primary burden upon the State of proving the fact of possession or the fact of the defendants having assumed to take title.

Whereupon, such proof having been made, there devolves upon the defendant the burden of establishing by evidence the fact that he is eligible to United States citizenship, and for that reason the proof of the plaintiff will not support a judgment in its favor against said defendant, in a case where the defendant shall have established his eligibility.

As said by the Supreme Court of the United States, speaking through Mr. Justice Holmes, in *Casey* vs. *United States,* 276 U. S. 413, at page 418:

> "Furthermore, there are presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof. *Greer* vs. *United States,* 245 U. S. 559. The statute here talks of *prima facie* evidence but it means only that the burden shall be upon the party found in posses-

sion to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, Sect. 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sect. 2486."

The rule of convenience was suggested by the United States Supreme Court in a criminal case where, however, the statute did have the elements of a rational connection between the fact proved and the fact presumed. We refer to *Yee Hem* vs. *United States,* decided in 1925 and reported in Volume 268, United States Reports, at page 178. An act of February 9, 1909 (35 Stats. 614), sections 1 and 2, as amended January 17, 1914 (38 Stats. 275), prohibited the importation of smoking opium after April 1, 1909. The act made it an offense to conceal such opium, knowing it to have been imported contrary to the law, and provided that possession by the defendant "shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury."

The court, at page 183, quoted from *Mobile etc. R. R.* vs. *Turnipseed,* 219 U. S. 35, at 42-43, as follows:

" 'The law of evidence is full of presumptions either of fact or law. The former are, of course,

disputable, and the strength of any inference of one fact from proof of another depends upon the generality of the experience upon which it is founded.

* * * * *

Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government. Statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous. * * *'"

Then, with reference to the rule of convenience, we find the court using this language at page 185:

"The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. *If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case.* The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would

be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the constitution."

We have italicized the above to indicate the court's reference to the rule of convenience.

With reference to the presumption of innocence with which the law clothes every defendant, and its relationship to the rule of convenience, and the shifting of the burden of proof to the defendant, we have a very good discussion by the Supreme Court of Oregon in *State* vs. *Rosasco,* 205 Pac. p. 290, at page 294, col. 2, and page 295, col. 1, as follows:

"The trial court, by its instructions, did not reverse the presumption of innocence with which the law clothes every defendant when upon trial charged with crime. The presumption of innocence is not a mere form, but a substantial part of the law, that remains with the defendant from the beginning of the trial until a verdict is found. The law presumes every defendant upon trial charged with crime to be innocent, and it devolves upon the prosecution to prove by evidence to the satisfaction of the trial jury, beyond a reasonable doubt, that the defendant committed the crime charged in the indictment. The burden of proof is never shifted from the state to the defendant, but remains with the state throughout the trial, to establish every constituent element of the crime as charged. *State* vs. *Huffman,* 16 Or. 15, 24, 16 Pac. 640; *State* vs. *Gibson,* 43 Or. 184, 73

Pac. 333; *State* vs. *Keelen* (Or.), 203 Pac. 310; Bishop's Crim. Proc., 1048 to 1055, inc.; *State* vs. *Duestrow,* 137 Mo. 44, 38 S. W. 554, 39 S. W. 266; *Horn* vs. *State,* 30 Tex. App. 541, 17 S. W. 1094; *Long* vs. *State,* 23 Neb. 33, 36 N. W. 310; *State* vs. *Lowry,* 42 W. Va. 205, 24 S. E. 561. But this does not mean that, when a defendant relies upon an exception for a defense, the state must prove that he is not within the protection of the exception.

'Indeed,' say the editors of R. C. L., 'it is stated as a maxim that the burden of proof never shifts from the prosecution to the defense. This, however, means only that it never shifts in so far as it is necessary to make out the specific crime charged in the indictment, by establishing the *corpus delicti* and the constituent elements of the crime. When distinct, substantive matter is relied upon by the defendant to exempt him from punishment and absolve him from liability, which is foreign to the issue as made by the state in the charge against him, the burden of proving it properly should be upon the defendant.' 8 R. C. L. p. 171."

De Graff vs. *State,* 103 Pac. 538.

This was a case decided by the Criminal Court of Appeals of Oklahoma. The State statute made it unlawful to ship or in any way convey liquors from one place within the State to another place therein "except the conveyance of a lawful purchase as herein authorized."

Counsel for the defendant insisted that the second

count was defective because it failed to negative the exceptions contained in the statute.

In deciding that the burden is upon the defendant to prove that he comes within the provisions of this exception and that the indictment need not negative the exceptions contained in the statute, the court, at pages 547 and 548, said:

> "When an exception is stated in a statute, and the existence of the fact or facts necessary to bring the act charged within the exception are peculiarly within the knowledge of the defendant, the burden is upon the defendant to prove the facts so within his knowledge, and which constitute a defense to the accusation. In other words, the nonexistence of such fact or facts will be presumed in the absence of evidence to the contrary. There is no safer or higher authority on the law of evidence than Mr. Wigmore. His statements of law are clear and accurate, and his citation of authorities, as far as we have had occasion to look them up, are correct and to be relied upon. Referring to the principle above stated, on page 2512, vol. 4, in his work on Evidence he says: 'In sundry other instances, a naturally affirmative defense is sometimes apportioned to the accused burden'."

* * * * *

> "Mr. Black, a standard authority, in his work on Intoxicating Liquors (page 597), announces the same doctrine, as follows: 'Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by

that party. Such is the case in civil or criminal prosecution for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor; as, for selling liquor, exercising a trade or profession, or the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great. Another view advanced by the court in Georgia is that plea of "not guilty" to a charge of selling without license, amounts to an allegation of selling with license, and the rule applies that he who alleges affirmative must prove it, especially if it is peculiarly within his knowledge.'

Now if it is not necessary for the state to prove the nonexistence of such exceptions, why is it necessary to negative them in the information or indictment? That this negative is not necessary is held in the following cases:" (Citing cases.)

In this case there was no statute creating a presumption. As for the phraseology of the statute, it appears that the exceptions are not made a part of the description of the offense. For this, see the language of the court at pages 546 and 547. For significance of the phraseology, see our discussion of the next case, *State* vs. *Miller*.

State vs. *Miller*, 81 S. W. 867.

This case, decided by the Supreme Court of Missouri, determined that a person charged with being an accessory after the fact has the burden of proving

that he comes within the classes of exempted persons defined by the statute. At pages 873 and 874 the court said:

"We are thus brought to the last contention of defendant, and that is that the state did not show that defendant did not stand in the relation of husband or wife, parent or child, grandparent or grandchild, brother or sister, the persons excepted by our statute (section 2365, Rev. St. 1899) from guilt by reason of aiding and assisting an offender after the commission of a crime, with intent to aid him in escaping or avoiding arrest."

* * * * *

"*While it is true this exception of relations in certain degrees appears in the enacting clause of this statute,* and therefore it was necessary for the grand jury to negative such a relationship, yet it is also true that, if such a relation existed, it was an absolute defense whether Woodward was guilty or not, and it is a reasonable presumption in the practical administration of justice that a man is acquainted with his own relatives, or at least knows of his relationship to those within the degrees fixed by the statute, and when, as in this case, the defendant was shown to have sworn he did not know who Grant Woodward was, it would have been a work of supererogation for the state to have gone further in proving the negative. It is true the defendant did not have to prove his innocence; but, if there was any such relationship as would have excused him in aiding Woodward to make his escape, it was peculiarly within his own knowl-

edge, and he has not availed himself of it." (Italics ours.)

* * * * *

"While we think the grand jury was required to negative the relationship of Woodward and defendant, we hold that the knowledge of such a relationship as would, under the statute, excuse defendant for aiding and assisting Woodward escaping arrest, was within the peculiar knowledge of defendant, and could have been established without any inconvenience and upon the authority of our own decisions, as well as those quoted from the common-law authorities, the burden was on him to show the relationship, which would itself have entitled him to an acquittal."

There was no statute creating a presumption.

The statute in this case provided that "every person not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity, who shall be convicted of having concealed any offender after the commission of any felony * * * shall be deemed an accessory after the fact * * *."

Revised Statutes of Missouri, 1899, Sec. 2365.

The court's reference to the necessity of an allegation in the indictment negativing the relationship of Woodward and defendant, has to do with an artificial distinction made in some of the cases. This distinction so made is where an exception provided in a statute, excusing a defendant, is included in the

enacting clause, rather than in a proviso creating the exception. The court holds that the negation of facts excusing defendant should be expressed in the indictment. But at the same time the court expressly applies the rule of convenience, where facts are peculiarly within the knowledge of the defendant, irrespective of the form of the statute.

Fleming vs. *The People,* 27 N. Y. 329.

The statute declared that every person having a wife living, who shall marry any other person, "except in the cases specified in the next section," shall be adjudged guilty of bigamy.

The next section declared that the preceding one should not apply to certain classes of persons. The court held that the burden was on the defendant to show he came within one of the excepted classes—on ground of rule of convenience.

The important thing in this decision is that, so far as the opinion written by Denio, Chief Justice, is concerned, he read that statute as in effect including the exceptions in the enacting clause—and therefore that the indictment was technically defective in not negativing them, but *nevertheless* held that he would apply the rule of convenience—and *in the absence of any statute creating the presumption.*

At page 334 Chief Justice Denio says:

"It is, moreover, a general rule of evidence that where the negative of an issue does not permit direct proof, or where the facts come more

immediately within the knowledge of the defendant, the *onus probandi* rests upon him."

State vs. *Evans,* 50 N. C. 250.

Here we have a case where, *in spite of the fact that the State was required to prove the negative allegations* because of the wording of the statute, the court recognized that there would be an exception in the case where the rule of convenience was applicable.

Freiberg vs. *State,* 94 Ala. 91, 10 So. 703, held that in a prosecution for selling liquor to a minor, the burden is on the defendant to show the consent of the parent or the person having control of the minor, rather than on the prosecution, to show the want of such consent.

The Freiberg decision cites *Farrall* vs. *State,* 32 Ala. 557, and *Atkins* vs. *State,* 60 Ala. 45.

Section 4038 of the code is referred to in the decision of the court, and also an amendatory act wherein the words "or guardian" are omitted, leaving the statute as amended to read "without the consent of the parent or person having the management or control of such minor." Acts 1890-91, page 1209.

It would appear from such phraseology as is quoted by the court that the exception in the statute is made an element descriptive of the offense. Nevertheless the rule of convenience is applied.

Farrall vs. *The State,* 32 Ala. 557 (cited also in *Gains* vs. *State,* in 43 S. 137).

Here defendant was indicted for selling liquor to a minor, "a pupil of a school or academy," "without the consent of the parent or guardian, or the person having charge of such" pupil.

The defendant asked the court to instruct the jury that the burden of proving that the sale by the defendant was without the consent of the parent, guardian or person having charge of the minor was upon the State. The court refused the instruction.

At page 559 the court said:

> "The charge asked by the defendant was properly refused. 'Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party'; as in a criminal prosecution for a penalty, for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor. Here the defendant, if licensed by the consent of the parent, guardian, or person having charge of the pupil, has peculiar knowledge of it, and can show it without the least inconvenience; and the burden of proving the consent is on him, the consent being in the nature of a license to him. 1 Greenleaf on Evidence (8th Ed.), Sec. 79, and note 1."

Evidently there was no statute creating the presumption. The exact phraseology of the statute is not given except as above quoted, but it would appear that the exception is made an element of the

description of the offense, and nevertheless the rule of convenience is applied.

Atkins vs. *The State,* 60 Ala. 45.

Under an indictment for selling spirituous liquors to a person of known intemperate habits, without the requisition of a physician, the onus is on the defendant to show that he had such requisition, and not on the prosecution to show the want of it.

No statute creating the presumption is set forth.

The exact phraseology of the statute violated is not given, but the indictment was for so selling liquor to a person of intemperate habits "not having at the time the requisition of a physician that the same was for medical purposes." If that was the language of the statute, it would appear that the exception ws an element descriptive of the crime, and nevertheless the rule of convenience was applied.

State vs. *McGlynn,* 34 N. H. 422.

Indictment for keeping intoxicating liquor for sale. One section of the State act declared it unlawful to sell or keep for sale intoxicating liquor—provided that nothing in the act shall prohibit (then detailed certain exceptions.)

On the question of burden of proof as to this and as to what indictment must allege, the court held that since the exceptions were stated in provisos rather than in the enacting clause, the exceptions could be omitted from the indictment.

Then, as to the rule of convenience, it was held that the State did not have to prove that defendant was not an agent for the sale of liquor.

The phraseology of the statute is not given exactly but the court, at page 427, says:

> "The statute provides that no person, not being an agent, shall sell," etc.

This should be read in connection with the language found at page 426:

> "In many cases negative averments and allegations being of the essence of the offense, or of the ground of action, must be proved. But where the subject matter of a negative averment relates to the defendant personally, or is peculiarly within his knowledge, the averment will be taken as true unless disproved by him."

The above language may well be read to mean that the court considered this a case where the negative averments were of the essence of the offense—and nevertheless applied the rule of convenience.

United States vs. *Tria,* 17 Philippines, 303.

Prosecution for criminal violation of the election law in that defendant voted without being qualified so to do. The election law described special qualifications for electors.

The prosecution introduced certain evidence to show lack of these qualifications.

At pages 307 and 308 the court said:

"An accused person sometimes owes a duty to himself if not to the state. If he does not perform that duty he may not always expect the state to perform it for him. If he fails to meet the obligation which he owes to himself, when to meet it is the easiest of easy things, he is hardy indeed if he demand and expect that same full and wide consideration which the state voluntarily gives to those who by reasonable effort seek to help themselves. This is particularly so when he not only declines to help himself but actively conceals from the state the very means by which he may assist him.

* * * * *

Where the subject-matter of a negative averment in an indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him. (*The People* vs. *Boo Doo Hong,* 122 Cal. 606; *Com.* vs. *Thurlow,* 24 Pick. 374; *State* vs. *Wilson,* 62 Kan. 621; *United States* vs. *Chan Toco, supra.*)"

There was no statute creating a presumption.

The form of the statute does not appear, but it would appear that the lack of qualifications must be an element descriptive of the offense.

In the case of *Cleary* vs. *State,* 19 S. W. 313, there was an indictment for performing labor on Sunday, other than "customary household duties of daily

necessity, comfort or charity." The Supreme Court of Arkansas held that the burden was on the defendant to show that he came within the exception, because the facts were peculiarly within his knowledge. Here there was no rational connection between the performing of work on Sunday or any other day of the week, and the presumption that the work so performed was unnecessary work.

There are some instances where this burden of proving facts peculiarly within the knowledge of a defendant may be visited upon the defendant without legislation. Courts have for many years so ruled in particular instances, as, for example, in the medical license cases. In many other cases, however, the courts have determined that without statutory expression this rule of evidence will not be applied. Then it devolves upon the State by legislation to create the rule, as has been done in California.

The statute in our case is one dealing with burden of proof as above discussed by the United States Supreme Court rather than dealing with valuation of evidence.

It may be further remarked that "presumptions" are used in two senses. In the one sense the term is employed to convey the thought of a bridge or connecting link between one fact established and a fact sought. In that sense, since the procedure which we are to follow is evidentiary in character, there should be some logical and reasonable bearing

between the fact established and the fact to be established. Therefore, if we would go from the fact established to the fact to be established through the process of a presumption, then such presumption must from an evidentiary point of view be a rational or reasonable step from which or by means of which we can mentally step from the established fact to the fact to be established.

An exception to this rule would be where the State, from the standpoint of public policy, establishes by legislation conclusive presumptions. The courts will not disturb such presumptions so established.

On the other hand the term "presumptive" is often employed as indicating the locus or the point at or upon which one or the other of the litigants must assume the burden of going forward with evidence, else there will be indulged against him an inference or "presumption."

In the case of *People* vs. *Mallon,* 222 N. Y. 456, the New York court held that a statute creating a *prima facie* presumption, deals merely with the rules of evidence, and not with any substantive right. It is also interesting to note, in passing, that the court held in this case, as did the California Supreme Court in the case of *People* vs. *Osaki,* 209 Cal. 169, that a statute creating a presumption such as is here in issue, does not compel a defendant to give testimony against himself. As pointed out in both cases it is always open to the defendant under

such a statute to explain away the presumption by testimony other than his own. See also *Yee Hem* vs. *U. S.*, 268 U. S. 178; 45 S. C. 470; *People* vs. *Brady*, 40 Cal. 198.

Most of the foregoing cases are cited and discussed in the opinion of the District Court of Appeal in the case of *People* vs. *Morrison and Ozaki*, 125 Cal App. 282, in which case the California State Supreme Court denied a petition for hearing before that court, and the United States Supreme Court refused to entertain jurisdiction of this case. See 288 U. S. 591; 53 Sup. Ct. Rep. 401. See also *People* vs. *Nakamura*, 125 Cal. App. 268, wherein the constitutionality of section 9a, now before this court, was upheld.

We feel that logically the rule of convenience might be applied in our case, without any statute. But we have a statute, adopted in 1927, as a result of the decision of the California Supreme Court in the *Quarez* case (*People* vs. *Quarez*, 196 Cal. 404), referred to by counsel for appellants at pages 20, 21 and 24. In that case the California Supreme Court limited the rule of convenience, in the absence of a statutory provision, to license cases. And so our statutes were adopted. The Quarez decision was overruled by the California Supreme Court in the instant case. So also was the case of *People* vs. *Frey*, 165 Cal. 140, referred to at pages 22, 24 and 26 of appellants' brief.

Furthermore, we submit that no claim can be

made that this section 9a violates the equal protection of the law clause of the Federal Constitution merely because said section apparently establishes racial classification of persons, and because it may appear to place a particular or different burden upon one class. Racial classifications of persons have been held not violative of the equal protection of law clause of the Federal Constitution. See *People* vs. *Nakamura, supra,* and cases therein cited.

In 5 R. C. L. 599, section 23, we find the following declaration on that subject:

> "* * * segregation laws are likewise a legitimate exercise of the police power and not violative of the provisions of the Federal Constitution, so long as they are not discriminatory in character or destructive of vested rights."

In *Cockrill* vs. *California,* 268 U. S. 258; 45 Sup. Ct. Rep. 490, the issue presented was the constitutionality of section 9 of the California Alien Land Law, and particularly that portion thereof which provides:

> "A prima facie presumption that the conveyance is made with such intent" (of violating the California Alien Land Act) "shall arise upon proof of * * * the taking of the property in the name of a person other than the persons mentioned in section 2 hereof, if the consideration is paid or agreed or understood to be paid by an alien mentioned in section 2 hereof. * * *"
>
> (That is, by an alien ineligible to United States citizenship.)

This court in that case said, at page 262:

> "The equal protection clause does not require absolute uniformity, or prohibit every distinction in the laws of the state between ineligible aliens and other persons within its jurisdiction. The state has a wide discretion and may classify persons on bases that are reasonable and germane having regard to the purpose of the legislation. *Truax* vs. *Corrigan,* 257 U. S. 312, 337; 42 S. Ct. 124; 66 L. Ed. 254; 27 A. L. R. 375. This is well illustrated by the Alien Land Laws. *Terrace* vs. *Thompson, supra,* 218 (44 S. Ct. 15); *Porterfield* vs. *Webb, supra,* 233 (44 S. Ct. 21); *Webb* vs. *O'Brien, supra,* 324 (44 S. Ct. 112); *Frick* vs. *Webb, supra,* 333 (44 S. Ct. 115). The fact that in California all privileges in respect of the acquisition, use, and control of the land for agricultural purposes are withheld from ineligible Japanese constitutes a reasonable and valid basis for the rule of evidence."

The United States Supreme Court there held that under the provisions of the Alien Land Law there is a rational connection between the facts proved and the intent authorized to be inferred from them, and that the rule of evidence established by the statute does not operate to preclude any defense. See also *Terrace* vs. *Thompson,* 263 U. S. 197.

We shall later see, however, that the requirement of a rational connection between the fact proved and the ultimate fact presumed is to be applied in the ordinary cases of statutory presumptions; but that when we consider the common law rule of conven-

ience we are confronted by an entirely different principle. That is, we have a rule of common sense dictating no impossible burden for the State to assume; and at the same time, no undue hardship on a defendant, with reference to due process.

The rule of rational connection between a fact proved and the ultimate fact presumed has nothing to do with this case. We go to an entirely different principle—the common law rule of convenience, supplemented in our case with a statutory expression thereof.

That means that it is ridiculous to place a burden on the State that is insurmountable, when it is the simplest thing in the world for a defendant to meet it. It also means that in such a situation the other principle, applicable to statutory presumptions generally, or rational connection between the fact proved and the ultimate fact presumed, is not to be considered.

The California State Supreme Court, in *People* vs. *Osaki,* 209 Cal. 169, drew this distinction very clearly. This is the case in which the court clearly sustained section 9b of the Alien Land Act, contained in the 1927 amendments, and also used language approving of section 9a of that act, and section 1983 of the Code of Civil Procedure, added in 1927, which two latter enactments are now before this court. At pages 194 and 195 the California Supreme Court said:

"Appellants contend, and cite numerous cases

as authority in support of their contention, that a rational connection between the fact proved and the ultimate fact presumed must exist. In most all of the cases cited to the point there is no semblance of rationality between the fact proved and the fact presumed. Appellants rely with seeming assurance upon two comparatively recent decisions of the United States Supreme Court, *Manley* vs. *Georgia,* 279 U. S. (73 L. Ed. 575; 49 Sup. Ct. Rep. 215, 217), and *Western & Atlantic Railroad* vs. *Henderson,* 279 U. S. 639 (73 L. Ed. 884; 49 Sup. Ct. Rep. 445, 446). The first of these cases was upon a statute of Georgia which provided that every insolvency of a bank should be deemed fraudulent and the president and directors should be punished by imprisonment and labor in the state penitentiary for not less than one or more than ten years, provided that the defendant might repel the presumption of fraud by showing that the affairs of the bank had been fairly and legally administered. The indictment merely alleged that the appellant, being president of a certain bank, and he and two others being directors and the accused being by law charged with th fair and legal administration of the business and affairs of said bank, then and there pending, and during the official charge and responsibility of the accused said bank became fraudulently insolvent. The court, upon considering the facts to be presumed, held that they were vague and uncertain and the connection between the fact proved and that presumed was not sufficient, expressing itself as follows:

'Unforeseen demands in excess of the reserves required do not tend to show that the crime created by section 28 has been committed. The same may be said as to the other conditions defined as insolvency. The connection between the fact proved and that presumed is not sufficient.'

The rule of convenience was not discussed." (Italics supplied.)

"The other case rested upon a Georgia statute, which provided:

'A railroad company shall be liable for any damages done to persons, stock, or other property by the running of the locomotives, or cars, or other machinery of such company, or for damage done by any person in the employment and service of such company, unless the company shall make it appear that their agents have exercised all ordinary and reasonable care and diligence, the presumption in all cases being against the company.'

"In condemning the statute the court remarked that a statute creating a presumption that is arbitrary or that operates to deny *a fair opportunity to repel it* violates the due process clause of the Fourteenth Amendment." (Italics are the court's.)

"In this case *no reference was made to the rule of convenience and obviously there was no room for its application for the reason that the facts were as accessible to appellees as they were to appellants.*

Those cases and others cited by appellants in which the connection between the facts proved and the fact presumed is more arbitrary and irra-

tional than disclosed by said cases, do not change the rule approved by numerous judicial pronouncements which have been and which may readily be cited." (Italics supplied.)

We call the court's attention to the California Supreme Court's distinguishing of the cases of *Manley* vs. *Georgia*, and *Western and Atlantic R. R.* vs. *Henderson*, in answer to appellants' citation of those cases at page 44 of their brief.

With reference to the above case of *Manley* vs. *State of Georgia*, Vol. 49, Supreme Court Reporter, page 215, this case involved a banking act of Georgia of 1919 providing that every insolvency of a bank shall be deemed fraudulent as to the president and directors. This was held to be a denial of due process and in violation of the Fourteenth Amendment to the United States Constitution in that the presumption created thereby is unreasonable and arbitrary, as pointing to no specific transaction, matter or thing as the cause of fraudulent insolvency, or to any act or omission of the accused tending to show his responsibility.

The court very properly expresses the rule at page 217 as follows:

"State legislation declaring that proof of one fact or a group of facts shall constitute prima facie evidence of the main or ultimate fact in issue is valid if there is a rational connection between what is proved and what is to be inferred. If the presumption is not unreasonable and is

not made conclusive of the rights of the person against whom raised, it does not constitute a denial of due process of law. *Mobile, J. & K. C. R. R.* vs. *Turnipseed,* 219 U. S. 35, 43, 31 S. Ct. 136, 55 L. Ed. 78, 32 L. R. A. (N. S.) 226, Ann. Cas. 1912A, 463. A prima facie presumption casts upon the person against whom it is applied the duty of going forward with his evidence on the particular point to which the presumption relates. A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the Fourteenth Amendment. *Bailey* vs. *Alabama,* 219 U. S. 219, 233 *et seq.,* 31 S. Ct. 145, 55 L. Ed. 191. Mere legislative fiat may not take the place of fact in the determination of issues involving life, liberty or property. 'It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.' *McFarland* vs. *American Sugar Co.,* 241 U. S. 79, 86, 36 S. Ct. 498, 501 (60 L. Ed. 899).

* * * * *

The connection between the fact proved and that presumed is not sufficient. Reasoning does not lead from one to the other. *Hawes* vs. *Georgia,* 258 U. S. 1, 4, 42 S. Ct. 204, 66 L. Ed. 431. The presumption created by Section 28 is unreasonable and arbitrary. *Bailey* vs. *Alabama, supra; McFarland* vs. *American Sugar Co., supra.*"

All of this has nothing to do with the rule of convenience on which we are relying in this case. There is nothing, either in the Georgia statute or in the

language of the United States Supreme Court, remotely bearing upon the question of the propriety of shifting the burden of proof to a defendant who has within his own knowledge facts which are impossible of proof by the State.

The rule of convenience was most ably discussed and applied in *People* vs. *Velasquez,* 70 Cal. App. 362. In that case defendant was charged with a violation of a criminal statute, that is, with having under his control and in his possession a firearm capable of being concealed upon his person, he being then and there a foreign born person and not a citizen of the United States. He was found guilty as charged.

The court, at pages 366 and following, said:

"Finally, the appellant contends that, even if it be conceded that there is proof of his foreign birth, there is no evidence tending to show that he had not been naturalized. Appellant argues that not only is the burden upon the prosecution of proving all the allegations of the information but that the presumption is that every person is a citizen of the country in which he resides. We have already shown that the evidence was sufficient to prove that the defendant was an alien by birth. The presumption is that this status continues until the contrary is shown. (*Bode* vs. *Trimmer,* 82 Cal. 513, 517 (23 Pac. 187).) It was, therefore, unnecessary for the prosecution, after showing that the defendant was foreign born, to further show that he had never been naturalized.

In this connection the Attorney General has suggested that the allegation of the information, relative to the defendant not being a naturalized citizen of the United States, is an allegation of a negative fact which is peculiarly within the knowledge of the defendant, and therefore that it comes within the rule that the burden of proving such an allegation is cast upon the defendant. While no authorities are cited in support of this argument, we are nevertheless of the opinion that it is both reasonable and sound. Naturalization of an alien as a citizen of the United States is an act. It can only be proven by the record itself, or a duly authenticated copy thereof. It can not be proven by parol. (*Bode* vs. *Trimmer, supra.*) On the other hand, to prove that a person had not been naturalized would require evidence to the effect that no court of this country, having jurisdiction of naturalization proceedings, had ever granted naturalization to defendant. The rule is well settled in this State that, where the subject matter of a negative averment lies peculiarly within the knowledge of the defendant, the burden of proving the fact rests with the defendant. (8 Cal. Jur., Sec. 148.) This is an exception to the general rule that the burden of proof rests upon the prosecution, and the reason given for such exception is that it would greatly inconvenience the prosecution to prove such fact, whereas the defendant can prove it with no inconvenience at all. (8 Cal. Jur., Sec. 148.) This rule is applied in the main to prosecutions of persons charged with the violation of statutes making it illegal to

engage in certain business or to follow certain professions without first obtaining a license so to do. In most, if not in all, of the cases of which we have any knowledge, the statute designates the particular board or officer from which such a license is to be obtained. The inconvenience in such a case of procuring evidence that the accused had no such license as required by the statute can hardly be compared with that cast upon the prosecution in an action like the present, if required to prove that the defendant had not been naturalized. In the former class of cases, it would only be necessary to examine the records of one board, or the books of one officer, to ascertain whether the required license had been issued or not, and to have as a witness one person from the office of such a board, or officer, to prove the fact that no license had been issued to the accused. In an action like that before us, owing to the fact that the defendant might have been naturalized in any one of a large number of courts, it would be necessary to have as witnesses at the trial representatives or officers from all of said courts, and possibly the records themselves to show, if such were the fact, that the defendant had never been naturalized in any of said courts. Such a requirement would cast upon the prosecution an interminable amount of labor and the greatest of inconvenience. On the other hand, to require the defendant to show that he was naturalized, casts no unreasonable burden upon him. If he has had conferred upon him, by any court of competent jurisdiction, the privilege of citizenship, he either has his naturalization papers, or, if they

have been lost, properly authenticated copies thereof might be procured with little trouble or expense from the court which granted the original. We are, therefore, of the opinion that this exception to the general rule, relative to the burden of proof, should apply to actions like the present, and that it was not obligatory on the part of the prosecution to prove that the defendant had not been naturalized. His naturalization, if such were the fact, was peculiarly within his own knowledge and could have been proven by him with but little inconvenience. The prosecution having proven by competent evidence the foreign birth of the defendant, the allegation of the information that he had never been naturalized must be taken as true in the absence of proof to the contrary. (*People* vs. *Wah Hing*, 47 Cal. App. 327 (190 Pac. 662).)"

What was said in the above cited case as to the inconvenience, and in effect, the practical impossibility for the prosecution to prove affirmatively the fact of nonnaturalization of the defendant, is equally if not more applicable to the proof of the place of nativity of the defendant.

That is to say, the State could endeavor to prove that the defendant was not born in this country only by offering negative evidence that no certificates of birth on file anywhere in this country showed the birth of the defendant in this country; and could effectually establish the alienage of such defendant only by proving affirmatively his birth

in some other country. Obviously, this would be practically impossible in nearly every case.

The common law did not place the burden of proof on the prosecution where the fact to be proved (citizenship or eligibility to citizenship) is peculiarly within the knowledge of the defendant, and practically impossible of proof by the State. That was what the rule of convenience was intended for.

The case of *The King* vs. *Turner,* decided by the Court of King's Bench in 1816 and reported in 5 Maule & S. 206, is the leading common law case on the doctrine of convenience. The case was one in certiorari to review a conviction of the defendant on a charge of having certain game in his possession, not being a person qualified under the statute to have such game in his possession. There was testimony introduced proving the possession by the defendant of the game, to wit, sixteen pheasants and five hares, contrary to the form of the statute. It was charged by the defendant that it did not appear that any evidence was given in support of the information negativing the qualifications mentioned in the statute, which it was urged was necessary in order to sustain the conviction, "for if the party be qualified in any one respect, the justices have no jurisdiction."

Chief Justice Lord Ellenborough said, in deciding this case:

> "The question is, upon whom the *onus probandi* lies; whether it lies upon the person who

affirms a qualification, to prove the affirmative, or upon the informer, who denies any qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the statute 22 & 23 Car. 2, c. 25, Sect. 3, to which the proof may be applied; and, according to the argument of today, every person who lays an information of this sort is bound to give satisfactory evidence before the magistrates to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet,* but that the defendant may be qualified under the other. And does not, then, common sense shew, that the burden of proof ought to be cast on the person, who, by establishing any one of the qualifications, will be well defended? Is not the Statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side, but almost impossible on the other? I remember the decision of *Rex* vs. *Stone;* and the arguments of the learned Judges, who held the necessity of giving negative proof, were undoubtedly urged with great force; but I felt at the time, that if they were right, it would, in most cases, be impossible to convict at all. But in *Spieres* vs. *Parker,* 1 T. R. 144, I find Lord Mansfield

laying down the rule, that in actions upon the game laws (and I see no good reason why the rule should not be applied to informations as well as actions) the plaintiff must negative the exceptions in the enacting clause, though he throw the burden of proof on the other side. The same was said by Heath, Jr., in *Jelfs* vs. *Ballard,* 1 B & P. 468; and such I believe has been the prevailing opinion of the profession, and the practice. I am, therefore, of opinion, that this conviction, which specifies negatively in the information the several qualifications mentioned in the statute, is sufficient, without going on to negative, by the evidence those qualifications."

Concurring in this opinion it was said by Holroyd, J.:

"I am also of the same opinion. It is a general rule, that the affirmative is to be proved, and not the negative, of any fact which is stated, unless under peculiar circumstances, where the general rule does not apply. Therefore it must be shewn, that this is a case which ought to form an exception to the general rule. Now all the qualifications mentioned in the statute, are peculiarly within the knowledge of the party qualified. If he be entitled to any such estate, as the statute requires, he may prove it by his title deeds, or by receipt of the rents and profits; or if he is son and heir apparent, or servant to any lord or lady of a manor appointed to kill game, it will be a defence. All these qualifications are peculiarly within the knowledge of the

party himself, whereas the prosecutor has, probably, no means whatever of proving a disqualification. If this be so, instead of saying that the general rule of law ought not to apply to this case, it seems to be the very case to which the rule ought peculiarly to apply.''

Here we have expressed as early as 1816 and in language that is unanswerable, the doctrine of the rule of convenience. Such has been the common law ever since, and the reason for the application of such a rule in our case is just as persuasive as it was in that case. If a defendant in possession of game must meet the burden of proving that he falls within a class permitted to kill and possess game, equally so should a defendant in possession of land prove that he comes within a class permitted to own and possess land if in fact he has peculiar knowledge of a fact easy for him to produce and most difficult, if not impossible, for the State to show does not exist.

In California an ineligible alien can not own land or have any interest therein except as may be permitted by treaty. He therefore knows that he must be a citizen or eligible to citizenship or protected by treaty rights. He knows where he was born and he knows his race. He knows whether he was born in the United States or in some foreign country. He knows whether or not he has been naturalized as a United States citizen, and, if so, where. The State has the power to create this classification and pro-

hibit any right to acquire an interest in land except as permitted in our statute and by treaty. Certainly the State is more vitally interested as a police regulation in its lands, and particularly its agricultural lands, than was the King interested in game over which he had jurisdiction and control.

In the case of *People* vs. *Boo Doo Hong,* 122 Cal. 606, the Supreme Court cited from Greenleaf on Evidence, Volume I, Sect. 79, with reference to the rule of convenience, as follows:

> "But when the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. * * *"

Greenleaf in his text on evidence as above quoted, cited, among other cases, this leading case of *The King* vs. *Turner, supra.*

Counsel for appellants, at page 50 of his brief, just as completely misses the point when he says that:

> "It is useless, therefore, to refer to the ability of the defendants to rebut the statutory presumption and carry the statutory burden of proof, and likewise useless, as a legal question, to refer to the difficulty of proving the crime or the fact that the circumstances surrounding the crime are within the knowledge of the defendant. No such excuse has ever saved any statute condemned by the Supreme Court. Moreover, the same excuse could be made by any statutory presumption of crime. *Hardly a criminal charge can be imagined in connection with which it could not be*

said that defendant had peculiarly within his knowledge facts which could show his guilt or innocence; and almost every crime involves difficulties of proof. These are false quantities in measuring the sufficiency of a statutory presumption. The sole inquiry must be whether or not the crime itself or an essential element thereof is to be presumed without proof of the fact itself or of some other fact upon which a rational inference of guilt can be predicated.

It thus appears from the decisions of the Supreme Court of the United States, which of course are controlling on the question at issue, that the test to be applied is not whether or not defendant knows the fact nor whether the crime is difficult to prove, but whether the statute is sustained by the rational connection which all cases require."

It requires no rare discernment to appreciate that counsel for appellants is correct in saying that the fact of guilt or innocence is always within the knowledge of a defendant. But it also requires no rare discernment to appreciate that we here are considering an exceptional class of cases where it is practically impossible for the State to prove an element which a defendant can easily disprove.

Should the State be required to produce every clerk of every court in the United States having naturalization jurisdiction, to prove a defendant was never naturalized? Must the State produce every custodian of birth certificates in the United States to disprove United States birth of a defendant?

And even then, it might be that a birth certificate was never recorded.

It is a simple task for the defendant to prove either birth in the United States or naturalization by the United States. It is not only because the facts are within the knowledge of the defendant, that the rule of convenience is applicable. There is the additional element of practical impossibility of the State's meeting this burden of proof. And it is this distinction, so well discussed by the courts over a period of many years, both at common law and under statutory provisions, that is not grasped by those refusing to apply the rule of convenience in such a case as is now before this court. Included among those who do not understand this distinction is the author of the note in Vol. 17 of the California Law Review, pages 575 and following, referred to in appellants' brief at page 45.

In the case of *State* vs. *Abbey,* 67 Am. Dec. 754, there was a prosecution for the crime of bigamy. The statute recited that certain cases shall amount to that offense "except in the cases mentioned in the following section." The exceptions were described to the effect that the act would not extend to any person whose husband or wife has been continuously beyond the sea or out of the State for seven years and the party marrying not knowing the other to be living within that time, etc., etc. The Supreme Court of Vermont held that the burden was on the defendant to show that he came within the excepted

classes. Here there was no possible rational connection between the fact of marriage proved and a presumption reached that the defendant did not come within the excepted classes. The rational presumption would be, indeed, that he did come within the excepted classes.

In the case of *United States* vs. *Hayward,* 26 Fed. Cases, page 240, decided by the Circuit Court of the District of Mass. in 1815, there was an information *in rem* against 149 packages of goods seized upon land for an alleged illegal importation into the United States. The act alleged to be violated was "An act to interdict the commercial intercourse between the United States," etc., etc. Exceptions were made in the act with reference to importations in neutral vessels. The court held that the burden was upon the defendant to show the neutral character of the vessel because that fact was peculiarly within his knowledge. Here there could be no possible rational connection between the fact proved of importation and the fact presumed that the vessel was not a neutral vessel.

In the case of *State* vs. *Herman Krasne, etc.,* 170 N. W. 494, the defendant was charged in the state of Nebraska with having violated a statute of that State in causing to be inserted in a newspaper an advertisement containing statements which were untrue. The court held that the defendant must prove the truthfulness of his statements because this was a matter peculiarly within his knowledge. Here

again there could be no possible rational connection between the fact proved of an advertisement being published, and the fact presumed of its untruthfulness.

In the case of *United States* vs. *Tria,* 17 Philippines 303, there was a prosecution for criminal violation of the election law in that the defendant voted without being qualified so to do. The Supreme Court of the Philippines held that the burden was upon the defendant to show his statutory qualifications because these facts were peculiarly within his knowledge. There could have been no possible rational connection between the fact of his voting having been proved and a fact presumed that he was not qualified. And so, it may be said that the rule of convenience is an exception to the rationality rule.

In the case of *State* vs. *McCaffrey,* 37 Atl. 234, the Supreme Court of Vermont was construing a Vermont statute making it the duty of a person having control of a child between the ages of eight and fifteen years to cause such child to attend public school for a certain time each year, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education. At pages 235 and 236 the court said:

"Section 711, V. S., makes it the duty of a person having the control of a child between

the ages of 8 and 15 years to cause such child to attend a public school at least 26 weeks in a year, such attendance to begin with the school year, and be continuous, unless the child is mentally or physically unable to attend, has already acquired the branches required to be taught in the public schools, or is otherwise being furnished with the same education."

* * * * *

"The respondent contends that to establish the offense it was incumbent upon the state to negative the exceptions in the statute. The rule is that the exceptions must be negatived only where they are descriptive of the offense, or define it; but where they afford matter of excuse merely, and do not define nor qualify the offense created by the enacting clause, they are not required to be negatived. In this case the exceptions are not descriptive of the offense. If the respondent came within either of the exceptions, the fact was peculiarly within his knowledge, and should have been proved by him as matter of defense. The cases cited by the state and by the respondent support this rule. Judgment that there was no error and that the respondent take nothing by his exceptions."

In our statute the Legislature by positive law shifts the burden to the defendant if the facts are peculiarly within his knowledge. If, so far as the *corpus delicti* is concerned, the burden should shift merely as a result of changed phraseology in a statute placing the exception, as, being mentally

or physically unable to attend, or having already been taught the necessary branches, in a proviso, rather than in the description of the offense, what conclusion may we draw in our case?

Surely, the same result would follow when we have a separate statute particularly providing that the burden so shifts.

In Volume 16 of Corpus Juris, page 530, section 998, under "Criminal Law," we find the following text:

> "FACTS PECULIARLY WITHIN DEFENDANT'S KNOWLEDGE. Where the subject matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him."

We shall consider all of the cases cited in support of this text, except those cited elsewhere in this brief.

Gains vs. *State,* 43 So. 137. This is an Alabama case. The defendant was convicted of riding on a freight car without authority from the conductor of the train or permission of the engineer, and with the intention of being transported free. The statute made it a crime to do so when the defendant was not an employee engaged in the discharge of his duties. The defendant asked for certain charges

to the jury in substance that the burden of proof was on the State to prove beyond reasonable doubt that at the time he was riding he was not an employee of the road and engaged in the discharge of his duties; that he was riding on the train without the permission and consent of the conductor or engineer in charge of the train; that the State must show that at the time he was riding he had not paid his fare—all of which charges were refused. The Supreme Court of Alabama said, at page 138:

> "On the authority of *Farrall* vs. *State,* 32 Ala. 557, and *Freiberg* vs. *State,* 94 Ala. 91, 10 South 703, and the reasons there stated, the burden of proof was not on the State to prove the negative averment in the affidavit. *This was matter of defense particularly within the knowledge of the defendant.*" (Italics ours.)

No statute is referred to as creating the presumption.

Commonwealth vs. *Bull,* 76 Kentucky 656 (XIII Bush).

In an indictment for vending a ticket purporting to be in the Kentucky State lottery, for the benefit of the University of Paducah, it was held not incumbent on the commonwealth to aver and prove that the ticket sold was not issued by or under the authority of the grantee of a subsisting lottery privilege. At page 666 the court said:

> "This rule imposes no hardship on the ap-

pellee. * * * It is a fact peculiarly within the knowledge of the parties who manage and conduct the lottery, and as the defense relies on the ground that the ticket sold was issued by parties acting under the authority of an unexhausted and subsisting lottery grant, it is but reasonable and proper that he shall be required to establish the negative fact upon which his right to immunity from punishment depends. (Greenleaf on Evidence, Vol. 1, Sec. 79.)"

No statute creating the presumption is referred to.

Williams vs. *People,* 11 N. E. 881.

In this case there was considered by the Supreme Court of Illinois a statute of that State regulating the practice of medicine and prescribing the requisite qualifications to be possessed by physicians.

There was a proviso in the act that it should not apply to those who have practiced medicine for ten years. There was no evidence introduced by the State to show that the defendant did not come within the language of said exception.

The court sustained the proposition that the burden was on the defendant to show that he came within this exception. See the language of the court at pages 882-883.

There was no statute creating the presumption in this case.

State vs. *Wilson,* 64 Pac. 23.

The Kansas statute passed on by the Supreme

Court of Kansas was a medical practice act. The point arose as to whether the trial court erroneously placed the burden of proof upon the defendant. On this point the court, at pages 24 and following, said:

> "Complaint is made that the court below erroneously placed the burden of proof upon the defendant. The statute provides that 'it shall be unlawful for any person * * * who has not attended two full courses of instruction and graduated in some respectable school of medicine, either of the United States or of some foreign country, or who can not produce a certificate of qualification from some State or county medical society, * * * to practice medicine in any of its departments for reward or compensation.' Gen. St. 1899, Sec. 2302. * * * 'The statutes of Kansas require that, before any person can legally practice medicine for compensation in this State, he must have attended two full courses of instruction and graduated in some respectable school of medicine, either of the United States or of some foreign country, or be able to produce a certificate of his qualification from some State or county medical society. The burden of introducing some evidence tending to prove such qualification is on the defendant.' "

The court held that this burden of showing qualification was on the defendant.

It is interesting to note in this case that the court very carefully limits the rule of evidence in discussing the liquor license cases, even more so than is the

rule in California. That is, the court holds that where it would be convenient for the State to prove that the defendant did not have a license or certificate to sell liquor, the State should be required to make this proof, the reason being that the fact is as accessible to the State as to the defendant. But even in such a case, assuming the fact to be as accessible to the State as it is to the defendant, the court says at page 26, column 2:

> *"And in the absence of a statutory regulation relieving the State from the duty of proving that one charged with the unlawful sale of intoxicating liquor did not have a permit therefor,* because the reason for the rule fails in such a case the rule itself ought to fail, and the State, having access to admissible evidence, ought to be required to produce it. This is in accord with earlier decisions of this court. *State* vs. *Schweiter,* 27 Kan. 499; *State* vs. *Nye,* 32 Kan. 201, 204, 4 Pac. 134, 136. In other words, where evidence to prove the negative averment is not peculiarly within the knowledge of the defendant, but is also within the knowledge and control of, or upon reasonable effort and by the exercise of proper diligence may be secured by, the State, then and in such case the prosecution is bound to produce such evidence, and failing to do so, the defendant ought to be acquitted." (Italics supplied.)

Here we have a judicial expression that, even though the fact would be as accessible to the State

as to the defendant, it would be lawful for the State *by statute* to shift the burden of proof to the defendant.

State vs. *Zehnder,* 168 S. W. 666.

It was decided by the Springfield Court of Appeals in Missouri, that in a prosecution of officers of a corporation for violation of the local option laws, defended on the ground that they were incidental sales by a bona fide corporation to members only, the burden was on defendants to prove such facts as would bring them within the exception to the local laws, if there were such an exception.

There was no statute creating a presumption.

State vs. *Carlisle,* 139 N. W. 127.

This is a case decided by the Supreme Court of South Dakota. There was an indictment for practicing dentistry without a license. The act stated that its provisions shall not apply to students attending a dental college and performing acts of dentistry under the supervision of a preceptor or licensed dentist. The court held that where no evidence was offered on either side, the court did not err in refusing to charge that the accused could not be convicted for any period during which he was enrolled as a student, since the burden was on the defendant to produce evidence raising this issue.

The court further held that when the subject matter of a negative averment in an indictment or

information relied on by accused as a justification or excuse lies peculiarly within his knowledge, the burden of proof as to such justification or excuse is on him.

Ake vs. *State,* 32 Amer. Rep. 586.

In this case the Texas Court of Appeals decided that where by law the death penalty can not be inflicted for a given offense committed by a person of less than seventeen years of age, the burden of proof showing his nonage is on the defendant.

There was no statute in this case creating any presumption.

State vs. *Casto,* 132 S. W. 1115. Supreme Court of Missouri.

Prosecution for the offense of procuring a fatal abortion. The statute declared this a crime "unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose."

The information negatived these exceptions in the statute.

The State proved that the woman operated on was, prior to the operation, in perfect health. Then as to the burden of proof shifting to defendant to prove that the operation was necessary the court, at page 1118, col. 2, says:

> "If the burden was on the state to prove this negative, we think when it appeared by the

uncontradicted testimony that up to the very hour Anna Bell was taken to the Stotts house, she was in perfect health, the burden then shifted to defendants to show that the abortion was necessary to preserve her life, *because if such was the case and abortion had been resorted to for that purpose, the necessity was a matter peculiarly within the knowledge of defendant and the doctor.*" (Italics supplied.)

There was no statute creating this presumption.

Faraone vs. *United States,* 259 Fed. 507.

The defendant was tried on an indictment charging that at Memphis, Tennessee, he "did carry on the business of a retail liquor dealer without having paid the special tax therefor, as required by law."

It was decided that proof of the negative averment that the special tax required by law was not paid was not necessary in this case.

The court, at page 509, says:

"If payment had been made, the fact was peculiarly within the defendant's knowledge, and he could have shown it without inconvenience."

There was no statute creating any presumption.

Folmar vs. *State,* 97 So. 768.

Here we have a prosecution, under an Alabama statute, of a mortgagor for selling the mortgaged property, and the court decided that the burden was on the defendant to show that the mortgagee had

given his consent to the sale. The court held that a negative averment as to a matter peculiarly within the knowledge of the other party is taken as true unless it is disproven by the latter. The exact phraseology of the statute is not given.

At pages 769 and 770 the court said:

> "The burden was not upon the state to show that the holder of the mortgage did not consent to a sale of the mortgaged property. The state having proven the mortgage, the existence of the debt, and the sale of the mortgaged property by the defendant, discharged the burden resting upon it, and the burden was then on the defendant, if he relied upon that defense, to introduce evidence to show that the mortgagee consented to a sale of the mortgaged property."
>
> * * * * *
>
> "The burden of proving the consent of the mortgagee to a sale of the mortgaged property was on the defendant; the consent being in the nature of a license to him and being peculiarly within his knowledge."

We here have no statute creating any presumption.

Clark vs. *State,* 243 S. W. 865.

The indictment, under an Arkansas statute, charged that the defendant had kept in his possession certain stills without registering the same with the proper United States officer. The exact language of the statute is not given. Applying the rule of convenience the court, at page 866, said:

"The state proved that the still was found in appellant's possession, but no evidence was offered that he had not registered it with the proper United States officer, and the court refused an instruction requested by appellant that the burden of showing this fact was on the state. No error was committed in refusing this instruction, as it was held in the case of *Moore* vs. *State* (Ark.), 240 S. W. 1083, that this was a negative averment, particularly within the appellant's knowledge, and should have been disproved by the appellant himself. See, also, *Ring* vs. *State* (Ark.), 242 S. W. 561."

There was no statute creating the presumption.

United States vs. *Turner,* 266 Fed. 248.

In a prosecution under the National Prohibition Act for removing liquor without a permit it was held that the government need not prove want of a permit to make out a prima facie case.

The statute, being section 6 of the Volstead Act, reads that "no one shall * * * transport * * * any liquor without first obtaining a permit from the commissioner so to do, except that a person may, without a permit, purchase and use liquor for medicinal purposes when prescribed by a physician, as herein provided * * *."

At page 251 the court said:

"I assume that in a prosecution for transporting liquor without a permit the government would not have to prove the want of a permit in order to make out a prima facie case."

Here we have no statute creating a presumption.

Smith vs. *Commonwealth,* 244 S. W. 407.

This is a Kentucky case, decided by the Court of Appeals of Kentucky. An indictment charged the unlawful sale of intoxicating liquor in violation of a Kentucky statute denouncing the sale of liquor except for sacramental, medicinal, scientific or mechanical purposes. It was held that the indictment must allege that the sale of the liquor by the defendant was not for these particular purposes. The exact phraseology of the statute is not given.

Applying the rule of convenience, the court, at page 407, says:

> "The ground upon which the appellant rests his contention that the court should have directed a verdict of not guilty, and erred in refusing to do so, is that the commonwealth did not prove that the sale of the liquor was not for a sacramental, medicinal, scientific, or mechanical purpose, and, such being necessary allegations in the indictment, there was a failure of evidence to sustain the indictment and to prove the commission of a public offense."

At page 408, after stating that it is necessary to allege in the indictment that the defendant did not come within any of the exceptions created by the statute, the court again refers to the rule of convenience with reference to proof as follows:

> "We are not of the opinion, however, that in order to sustain a conviction the commonwealth

must assume the burden and prove that the purpose for which the liquors were sold was not for a sacramental, medicinal, scientific, or mechanical purpose. . To require the commonwealth to do this would be to require it to prove a negative, and, while the general rule applying to criminal prosecutions is that if the negative averments are an essential to making out the offense, the burden rests upon the commonwealth to do so, *except in the class of negatives which it is almost impossible to prove affirmatively, and the truth of the negative is peculiarly within the knowledge of the defendant, who is able forthwith and without inconvenience to demonstrate by evidence the truth touching it.* In such instances when the commonwealeth has proven an act which is forbidden to be done by statute, by all persons, except those of a particular class, or excepting certain qualified persons, a prima facie case is made out, and the negative averment is taken as true, unless disproved by the defendant. It is a general rule running through the law of evidence that where the negative of an issue does not permit of direct proof, or where the facts are more immediately within the knowledge of the defendant, the burden of proving that such averment is not true rests upon him." (Italics supplied.)

With reference to the above italicized language, it will be found that the court in this case refuses to apply the rule as to compelling proof by the State when negative averments are essential to making out the offense in those classes of cases

where the rule of convenience should apply. That is, the rule of convenience is an exception to the *corpus delicti* rule.

Roberts vs. *State,* 234 S. W. 89.

This is a case decided by the Court of Criminal Appeals of Texas.

It was decided that in a prosecution under a State statute for the manufacturing of liquor, when the evidence shows that the defendant manufactured liquor or possessed equipment for making liquor, then the burden is on the defendant to show that such manufacturing or possession was either for mechanical, medicinal, scientific or sacramental purposes. The court finally decided that the following instruction by the trial court was a proper instruction:

> "The state is not required to prove in the first instance that the manufacture of vinous liquor capable of producing intoxication or the possession of any equipment for making such vinous liquor or whisky was not for either medicinal, mechanical, scientific, or sacramental purposes; but, when the evidence shows that the defendant manufactured such vinous liquor or did possess equipment for making such vinous liquor or whisky, then the burden is on the defendant to show that such manufacture or possession was for either mechanical, medicinal, scientific, or sacramental purposes."

(See page 90, column 1, of Vol. 234 S. W. Reports.)

At page 90, column 2, the court said that:

> "Where the facts necessary to support such negative averment lie peculiarly within the knowledge of the accused, the burden of proving same is cast on him."

There was no statute in this case creating any presumption.

People vs. *Hollenbeck,* 153 N. E. 691.

This case was decided by the Supreme Court of Illinois.

The defendant was indicted for the violation of the Illinois prohibition act (Laws 1921, page 581). The indictment charged the selling of intoxicating liquor, the said sale not coming within certain exceptions contained in the act. One of these exceptions was the obtaining of a permit from the attorney general to sell intoxicating liquors, etc.

On the question of burden of proof of facts peculiarly within the knowledge of the defendant, the court, at page 693, said:

> "The court did not err in refusing to give to the jury the defendant's refused instruction to the effect that the burden was upon the state to prove that the defendant did not have a permit from the Attorney General to sell intoxicating liquor, etc. The general rule is, in prosecutions for criminal offenses, that where the subject-matter of a negative averment lies particularly within the knowledge of the defendant, the averment, unless disproved by the defendant, will be

taken as true. *People* vs. *Montgomery,* 271 Ill. 580, 111 N. E. 578; *Kettles* vs. *People,* 221 Ill. 221, 77 N. E. 472; *Williams* vs. *People,* 121 Ill. 84, 11 N. E. 881; *Noecker* vs. *People,* 91 Ill. 468."

There was no statute creating a presumption in this case.

Ex parte Kreutzer, 204 N. W. 595.

This case was decided by the Supreme Court of Wisconsin.

There was an indictment for a violation of the blue sky law (Statutes 1923, sections 183.25 to 183.44.) It was held that the indictment was not defective for failure to negative statutory exceptions. Section 183.26 provided: "Except as hereinafter provided, the provisions of sections 183.25 to 183.44, inclusive, shall not apply to" certain classes of securities therein named, and then these classes are described.

Section 183.27 (1) states:

> "Except as provided in subsections (4) and (5) hereof no company, broker, or other person, directly or through an agent shall in this state sell, offer for sale, negotiate for the sale of, take subscriptions for, or exchange for property any security for the sale of which a permit has not theretofore been issued, until there shall have been first applied for and secured from the commission a permit authorizing the sale of such security."

Subsection (4) provided that under certain condi-

tions brokers authorized by the commission to act may sell class A securities before applying for or securing a permit. Among these conditions was one that a bond for twenty thousand dollars should be given, conditioned as specified.

Subsection (5) provided that brokers authorized by the commission might sell securities issued prior to a certain date without a permit.

Referring to the rule that the burden is on the defendant where the exception or qualification is in a separate section, distinct from the enacting clause, the court, at page 601, said:

> "It was the common-law rule that, where an exception or qualification is in a separate section of the statute or in a proviso which is distinct from the enacting clause it is a matter of defense which the prosecution need not anticipate in the pleadings."

Referring to the general rule of convenience and citing the leading common law case of *King* vs. *Turner,* 5 Maule & Selwyns Reports, 206, the court, at page 601, says:

> "The further argument is made that the offenses charged were not proven by any competent evidence. The principal objection now made is that the state did not prove that the sales were those of securities not exempted or excepted by the statute."
>
> * * * * *
>
> "In a leading case, decided more than one hun-

dred years ago, where the defendant was accused of unlawfully having game in his possession, Lord Ellenborough said:

'There are, I think, about ten different heads of qualifications enumerated in the statute, to which proof may be applied, and according to the argument of today every person who lays an information of this sort is bound to give satisfactory evidence before the magistrate to negative the defendant's qualification upon each of those several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. * * * And does not then common sense show that the burden of proof ought to be cast upon the person, who by establishing any one of the qualifications will be well defended, is not the Statute of Anne in effect a prohibition on every person to kill game unless he brings himself within some one of the qualifications allowed by law the proof of which is easy on the one side, but almost impossible on the other?' *King* vs. *Turner*, 5 Maule & Selwyns Reports, 206."

We have here no statute creating a presumption. In *State* vs. *Whittier*, 21 Maine 341, 38 Am. Dec. 272, it was held that the burden of proving that a certain offense against property was committed with the owner's consent rested on the accused, that being a fact peculiarly within his knowledge.

In the case of *People* vs. *Volcano Canyon Toll Road Co.*, 100 Cal. 87, an information in the nature of a quo warranto was brought by the Attorney

General. The fact in issue was the exercising of a franchise. The court held the burden to be on the defendant to show by what warrant or authority it claimed and exercised the franchise. "There was no attempt to show any warrant or authority whatever. The judgment therefore was proper."

In *State* vs. *Clark,* 178 N. W. 419, it was held that the burden of proof was on the owner of a house of prostitution to show that he had no knowledge of the use to which the house was subjected.

In *State* vs. *Lipscomb,* 52 Mo. 32, it was held that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, it is taken as true, unless disproved by that party.

Indictment for selling liquor without a license.

Held, defendant must produce license because subject matter of negative averment in indictment lay peculiarly within his knowledge.

There was no statute creating the presumption.

State vs. *Keggon,* 55 N. H. 19.

Indictment for violating statute prohibiting sale of liquor and affirmatively alleged he was not agent for sale of liquor.

Held, State not required to prove this averment. Rule of convenience applied.

There was no statute creating the presumption.

People vs. *Nyce,* 13 Hun. 298.

Under New York statute (Laws of 1874, Chapter

436, Sec. 3) defendant was convicted of the offense of practicing medicine without being authorized so to do "by a license, or diploma from some chartered school, State Board of Medical Examiners, or Medical Society."

Held, burden on defendant to show he was so licensed.

There was no statute creating the presumption.

State vs. *Arnold,* 35 N. C. 184.

Held, that where the defense on an indictment for murder is that the prisoner is under the age of presumed capacity, the onus of proof lies on the defendant. At page 192 the court says:

> "As the subject of direct proof the onus was certainly on the prisoner, as the reputed age of every one is peculiarly within his own knowledge, and also the persons by whom it can be directly proved."

There was no statute creating the presumption.

In Greenleaf on Evidence, Part II, Chapter III, Sec. 79, page 111, we read:

> "Negative allegations. But where the subject-matter of a negative averment lies *peculiarly within the knowledge* of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly

licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here, the party, if licensed, can immediately show it, without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great."

Jones on Evidence, 2d Edition, section 181, which is entitled "Burden as to particular facts lying peculiarly within knowledge of a party" has the following to say on this general subject matter:

"On principles already discussed the burden of proof as to any particular fact rests upon the party asserting such fact. The burden of proof may during the course of the trial be shifted from one side to the other; and where the fact is one peculiarly within the knowledge of one of the parties, slight evidence may suffice for that purpose. Many illustrations in this chapter clearly show that where the *facts lie solely within the knowledge of one party,* this is an important consideration in determining the amount of evidence necessary to be produced by the other party. 'The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other; and in considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respect-

ively.' This is often illustrated in prosecutions for selling liquor or doing other acts *without the license* required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense, the burden is upon the defendant to prove the fact so clearly within his own knowledge."

No one has a right to acquire an interest in real property in this State unless he is either a citizen or eligible to United States citizenship, unless he is accorded such right by a treaty. If a person is found in possession of real property and it is charged that he is violating the Alien Land Act, the law simply throws upon him the burden of proving that he does not fall within the category of persons who are prohibited from enjoying real property in this State.

Similarly the law forbids an alien from carrying a concealed weapon at all, and therefore prohibits him from carrying such a weapon without a license. If he is found in possession of such a weapon the law simply throws upon him the burden of proving that he does not fall within the category of persons who are prohibited from carrying such weapons.

The presumption is not conclusive; it is merely *prima facie*. Therefore, it can not be said that, being an absolute presumption, the statute may be regarded as one of substantive law.

The presumption in our case is not one of evidentiary or probative effect, nor is it intended to be of that character. It is intended by the State, speaking through the Legislature, to regulate by this presumption the *order* of proof; in other words, the procedure, placing the burden upon the State to prove the fact of possession or the fact of the defendant's having assumed to take title.

Whereupon, such proof having been made, there devolves upon the defendant the burden of establishing the fact by evidence that he is either a citizen or is eligible to United States citizenship, or is protected by a treaty and for that reason the proof of the plaintiff will not support a judgment in its favor against said defendant, in a case where the defendant shall have established his eligibility.

It may be further remarked that "presumptions" are used in two senses. In the one sense the term is employed to convey the thought of a bridge or connecting link between one fact established and a fact sought to be established. In that sense the procedure which we are to follow being evidentiary in character, it might be argued that there should be some logical and reasonable bearing between the fact established and the fact to be established. Therefore, if we would go from the fact established

to the fact to be established by the form of a presumption, then it may be claimed that such presumption must from an evidentiary point of view be a rational or reasonable step from which or by means of which we can mentally step from the established fact to the fact to be established.

An exception to this rule would be where the State, from the standpoint of public policy, establishes by legislation conclusive presumptions. The courts will not disturb such presumptions so established.

Another exception has been made in many cases, as above noted, when, in fact, the rule of convenience should be applied. And so, we really are not compelled to depend upon the other use of the word "presumption" which we are about to discuss.

That is, the term "presumption" is often employed as indicating the locus or the point at or upon which one or the other of the litigants must assume the burden of going forward with evidence, else there will be indulged against him an inference or "presumption."

We again quote the language of the Supreme Court of the United States, speaking through Mr. Justice Holmes, in *Casey* vs. *United States, supra* (276 U. S. at 418):

> "There are presumptions that are not evidence in a proper sense, but simply regulations of the burden of proof. *Greer* vs. *United States,* 245 U. S. 559. The statute here talks of *prima*

facie evidence but it means only that the burden shall be upon the party found in possession to explain and justify it when accused of the crime that the statute creates. 4 Wigmore, Evidence, Sec. 2494. It is consistent with all the constitutional protections of accused men to throw on them the burden of proving facts peculiarly within their knowledge and hidden from discovery by the government. 4 Wigmore, Evidence, Sec. 2486.'"

There are some instances where this burden of proving facts peculiarly within the knowledge of a defendant may be visited upon the defendant without legislation. Courts have for many years so ruled in particular instances, as, for example, the medical license cases. In many other cases, however, the courts have determined that without statutory expression this rule of evidence will not be applied. Then it devolves upon the State by legislation to create the rule, as has been done in California.

The statute in our case is one dealing with burden of proof as above discussed by the United States Supreme Court rather than dealing with valuation of evidence.

B. Analysis of Cases on Rule of Convenience Showing That in Many of Them It Is Applied Even Though They Did Not Involve Liquor License or Medical or Dental Licenses.

In reading some forty-five cases decided by the

courts of last resort in twenty different States of the United States, which are referred to as supporting the text on the rule of convenience in Corpus Juris, it is interesting to note that in fully one-half of these cases there was no question involved with reference to liquor licenses or medical or dental licenses. As showing that the application of the rule in other jurisdictions is by no means restricted to license cases, we may point out that the broad sweep of the application of the rule is suggested by the following typical instances:

The riding on a freight car without permission from the conductor when not an employee. The defendant must show he was an employee.

A prohibition against working on Sunday other than work of daily necessity. Defendant must show the necessity.

Prohibition against selling of lottery tickets except under a lottery grant by the State. Defendant must show the grant.

Requirement that parents send child to school unless child mentally or physically unable to attend school. Defendant must show this inability.

Crime of bigamy with certain exceptions. Defendant must show exceptions.

Crime of committing an abortion, with exceptions, as necessity to save life. Defendant must show such necessity.

Prohibition against mortgagor selling mortgaged

personal property except with the consent of mortgagee. Defendant must show the consent.

Prohibition in blue sky law against selling stocks without permit unless exceptional circumstances appear. Defendant must show the circumstances.

Prohibition against importation of goods except in a neutral vessel. Defendant must show that the vessel was neutral.

Prohibiting offense against owners' property except with the consent of the owners. Defendant must show the consent.

Prohibition against exercising a franchise except by authority. Defendant must show the authority.

Prohibition against operation of house of prostitution—prosecution against owner of the property—the defendant must show that he had no knowledge of the use of the property.

In defense of nonage in a murder trial, defendant must show nonage.

Prohibition against unnaturalized foreigner carrying concealed weapon. Defendant must prove naturalization.

Prohibition against aiding an offender, unless the defendant husband or wife, etc. Defendant must prove relationship.

Prohibition against advertising by making false statements. Defendant must prove truthfulness of his statements.

Prohibition against voting unless qualified. Defendant must prove qualifications.

C. Analysis of Appellants' "Statement of the Points on Which Appellants Rely."

We shall now refer to some statements found in the "Statement of the points on which appellants rely," which we consider to be subject to criticism.

In Points XXV, XXVI, XXVII, XXVIII, XXIX and XXX, counsel for appellants relies entirely upon the rationality rule. That rule is not controlling in this case. The rule of convenience is.

In Points V, IX, XXIII and XXIV, counsel for appellants erroneously says that the California Supreme Court held that, under the California statutes, there was a rational connection between the facts proved and the ultimate facts found. The court particularly relied on the rule of convenience, and not at all on the rationality rule. The same error is made at page 23 of appellants' brief.

In Points II and IV, the appellants erroneously state that the California Supreme Court construed the California statutes as placing upon appellant Doi the burden of showing he is a citizen of the United States by reason of birth or naturalization, "solely by reason of the allegation of his ineligibility to citizenship in the indictment."

The statutes further require actual proof by the State of acquisition, possession and enjoyment, etc., of the real property involved. The same error is made at page 18 of appellants' brief.

Similarly, in Point XXV, counsel states that the

inference that defendant Doi, being in possession of agricultural lands is therefore an alien ineligible to citizenship, is unreasonable and purely arbitrary.

The statutes, however, also require allegation of ineligibility. The same criticism is pertinent to Points XXVIII and XXIX.

Counsel for appellant erroneously suggests in Points XVIII and XIX, that the California statutes cast upon defendant Doi the burden of proving his citizenship or eligibility to citizenship "as a prerequisite to the enjoyment and occupation," etc., of real estate in California, for agricultural purposes. And further, counsel is in error in saying that the California Supreme Court so held.

There is no such "prerequisite" except as a defense, after action brought by the State.

In Points I, II, IV, XVII and XVIII, reference is made to the Constitution of the State of California being violated by the statutes now before this court. Also at page 23 of appellants' brief the same point is urged.

The decision of the court of last resort of the State is conclusive in the matter of the proper construction of the State Constitution as related to this subject matter. See Hughes on Federal Practice, Vol. V, section 3242, page 331, where the rule is stated as follows:

> "The question whether or not a state statute conflicts with the constitution of the state does not present any question for review by the

> Supreme Court of the United States. That court will regard such a question as settled by the highest court of the state."

Counsel for appellants, in Point XX, urges that the Supreme Court of California erred in holding that the State Legislature, by the statutes now before this court, has cast the burden upon those whose eligibility is challenged in the name of the State, of proving such eligibility.

This is, of course, a matter of statutory construction, and it is well established that this court will not disturb the ruling of the court of last resort in California on that question:

> "The meaning attributed by the highest court of a state to a statute of the state must be accepted by the Supreme Court, on review, as though such meaning had been specifically expressed in the statute."
>
> Hughes Federal Practice, Vol. 5, Sec. 3241, page 331.

II

ANALYSIS OF CASES CITED BY APPELLANTS TO SHOW THAT NO ONE OF THEM IS IN POINT IN THE MATTER OF THE QUESTION BEFORE THIS COURT, THE ANSWER TO WHICH QUESTION IS TO BE DETERMINED BY THE RULE OF CONVENIENCE.

McFarland vs. *American Sugar Refining Company,* 241 U. S. 79 (appellants' brief, pp. 18, 27 and 49).

This case considered a statute of Louisiana which purported to impose penalties for monopoly and conspiracies in restraint of trade. The statute provided as follows:

> "Any person engaged in the business of refining sugar within this state who shall systematically pay in Louisiana a less price for sugar than he pays in any other state, shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction therefor shall be subject to a fine * * *."

The United States Supreme Court held that this presumption was invalid because it violated the Fourteenth Amendment to the United States Constitution.

The court stated the rule relied upon by counsel for appellants, that it is "essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

The court held that the presumption created in the statute had no relation in experience to general facts. It will be noted that there is nothing in the statute nor could there possibly be anything in the decision of the court involving the other equally well established rule of convenience. That is, there was not involved a situation where facts are

peculiarly within the knowledge of a defendant, and where, therefore, it is reasonable by statutory provision to relieve the State of the impossible burden of proving that which it is so easy for the defendant himself to disprove.

In the case of *State* vs. *Lapointe,* 123 Atl. 692, cited by counsel for appellants at pages 19 and 35 of his brief, the court considered a statute of the State of New Hampshire which made the possession of intoxicating liquor *prima facie* evidence of a violation of a statute prohibiting such possession, unless the liquor was lawfully procured.

The statute was held valid.

The discussion by the court of the unconstitutionality of the statute if construed as making such possession more than *prima facie* evidence, has nothing whatever to do with the rule of convenience. The court assumes that it was well within the power of the State to prove that the liquor was not lawfully procured.

Counsel for appellants apparently reads the language of the court criticizing many cited decisions, as leading to a conclusion against the application of the rule of convenience.

So read, this language suggests a minority rule clearly opposed by the many cases cited by the court.

Brightman vs. *United States,* 7 Fed. (2d) 532 (appellants' brief, p. 28).

This case considered the Harrison Narcotic Act. The statute provided that the possession of drugs would be *prima facie* evidence of the violation of the act. The court held that there was no such rational connection between the fact of the possession of morphine in the western district of Oklahoma and the fact of the purchase of it in that same district as to make the former *prima facie* evidence of the latter.

The court said "common experience does not support such a presumption."

There was nothing in this case requiring or in fact permitting the court to discuss the reasons for and justification of the rule of convenience.

O'Neill vs. *United States,* 19 Fed. (2d) 322, (appellants' brief, p. 28).

This also was a prosecution for a violation of the Harrison Narcotic Act. The defendant was convicted of the offense of selling drugs without paying the special tax required by the act. The prosecution relied upon the *prima facie* presumption which was claimed to arise under the statute from the possession of unstamped drugs.

Referring to the limitations on the power of Congress or the State Legislature to enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question, the court said:

"The limitations are these: There must be

some rational connection between the fact proved and the ultimate fact presumed; the inference of the existence of the ultimate fact from proof of another fact must not be so unreasonable or unnatural as to be a purely arbitrary mandate."

The court held that Congress could not reasonably enact that possession of unstamped narcotic drugs should be *prima facie* evidence of a violation of the act. This case has no bearing whatever on the rule of convenience which we are contending for in our case.

State vs. *Divine*, 98 N. C. 778; 4 S. E. 477 (appellants' brief, page 30).

A North Carolina statute prohibited the negligent killing of live stock by a railroad.

The statute provided that when stock was killed or injured by a running engine in certain counties, proof of that fact should be *prima facie* evidence of the negligence of certain specified officials of the railroad company. The statutory presumption was held to be void because unsupported by any reasonable connection between the proof and the inference of guilt.

Here again there is nothing involved concerning the existence of certain facts being known to the defendant and impossible of proof by the State.

In re Opinion of Justices, 208 Mass. 619, 94 N. E. 1044 (appellants' brief, page 30).

The Massachusetts statute provided that working

more than eight hours in any one day should be *prima facie* evidence of the violation of a statute forbidding persons from working more than eight hours per day except that employees given a Saturday half holiday might work more then eight hours the other days of the week.

The court held this statute invalid. The court said:

> "There are many statutes in which the Legislature has enacted that the existence of a fact which ordinarily created a strong probability of the commission of an offense shall be *prima facie* evidence of guilt, and such statutes have been held constitutional. * * * The provision of this section of the proposed act differs from those referred to in these decisions and is not within the principles on which the cited cases rest. Under this act, 'in cases where a Saturday half holiday is given' employees may work more than eight hours on other days of the week. Such cases will be common, and, on all of them work for a longer time than eight hours on any other day will not indicate the probability of violation of the law. To provide that such a fact shall constitute *prima facie* evidence that warrants a finding of guilt beyond a reasonable doubt, would be contrary to the fundamental purposes of criminal law. * * * We are of the opinion that the Legislature has no constitutional authority to punish any citizen merely upon evidence of the existence of a fact, which, in ordinary cases, has no tendency to establish guilt."

There is nothing in that case remotely allied to the consideration for sustaining the reasonableness of statutes creating the rule of convenience.

State vs. *Grimmett,* 33 Idaho 203; 193 Pac. 380 (appellants' brief, page 30).

An Idaho statute provided that any person who slaughters cattle must retain in his possession the hide of such cattle with the ears attached thereto for a period of thirty days, and that proof of the failure of any person to do so should be *prima facie* evidence of the commission of the crime of grand larceny as to the cattle slaughtered.

The court in holding this statute invalid stated that

> "where, however, there is no connection or rational relationship between the fact proved and the ultimate fact to be presumed, such a statute shifts the burden of proof, and in a criminal case deprives the defendant of the protection of his constitutional guaranty."

This case has nothing to do with the question of facts being within the knowledge of the defendant and of the reasonableness of the requirement that he be compelled to produce such facts to rebut a presumption created by statute.

Hall vs. *Johnson,* 87 Ore. 21; 169 Pac. 515 (appellants' brief, page 32).

In this case an ordinance of the city of Portland, Oregon, defined what was to be deemed to constitute

a conspiracy to endanger the trade, business or commerce of any person doing business in the city of Portland. It declared such a conspiracy a crime and fixed the punishment therefor. It went on to enumerate certain facts, the performance of any one of which was to be *prima facie* evidence of such a conspiracy. In effect the ordinance made it unlawful for workmen to strike, to solicit others to strike, or to solicit others from accepting employment by any person doing business in the city of Portland.

By section 3 of the act, picketing was made *prima facie* evidence of the offense. The court held the statute invalid, among other reasons because the facts declared to be *prima facie* evidence did not have any direct and logical tendency to prove the antecedent fact. This has nothing to do with the rule of convenience, the application of which we are urging in this case.

Ex parte Smith, 218 Pac. 708 (appellants' brief, page 32).

In this case the court considered a prohibition statute of Oklahoma, which provided that any mash found in any house or building should *prima facie* be deemed to have been made or fermented by and to be the property of the person in actual possession or control of the house or building. The court held the presumption to be unconstitutional.

The court said "it could hardly be said that there was a presumption of law that the person in posses-

sion of the ranch placed it there. All the authorities agreed that such a statutory rule of evidence is a dangerous one, and that it should not be applied where it has no intrinsic evidential force, or where its application will impair some positive statutory or constitutional right."

The court in this case was not considering a state of facts where the knowledge of certain facts was in possession of the defendant and impossible of proof by the State, and where therefore the rule of convenience should be applied.

Simpkins vs. *State,* 249 Pac. 168 (appellants' brief, page 32).

In this case a statute of the State of Alabama made it an offense to drive an automobile while intoxicated. The statute provided that if a person driving the automobile had on or about his person any intoxicating liquor, that fact should constitute *prima facie* evidence of such person having driven while intoxicated.

The court held the presumption to be void. It held that the presumption of intoxication arising from the possession by the person or the presence in the vehicle of liquor was not a "natural hypothesis or explanation of such possession. The inference between the fact of possession and the presumption of intoxication is too remote."

This case in no way involves the question of the reasonableness of a rule of convenience.

People vs. *Cuff,* 122 Cal. 589 (appellants' brief, page 38).

In this case on the trial of a defendant charged with an attempt to kill a person by the administration of poison, consisting of strichnia, the court held inadmissible the evidence which was circumstantial evidence of collateral facts tending to connect the defendant with other events and offenses of a different character and in relation to other persons occurring some time previous to the offense charged, which did not in any appreciable degree tend to show a motive for the attempted murder.

This has not even a remote connection with the rule of convenience, the application of which we are insisting upon in this case.

State vs. *Beswick,* 13 R. I. 211; 43 Am. Rep. 26 (appellants' brief, page 41). (This American Report volume is incorrectly referred to in brief of appellants as Volume 36, at page 102.)

In this case a statute provided that on a criminal prosecution for illegally keeping intoxicating liquors for sale it shall not be necessary to prove the actual sale, and that the notorious character of the premises, or the notoriously bad or intemperate character of those frequenting them, or the keeping of implements or appurtenances usually pertaining to grog shops and the like places, shall be *prima facie* evidence of such illegal keeping. The Rhode Island court held this statute to be unconstitutional.

Assuming this rule to be a valid rule, it has nothing to do with our argument that the rule of convenience is applicable under the facts of our case.

State vs. *Wilson,* 1 Atl. 415; 15 R. I. 180 (appellants' brief, page 42).

In this case the defendant was indicted under a Rhode Island statute for nuisance in keeping a grog shop. A section of the act provided that it shall not be necessary to prove an actual sale of intoxicating liquors in any building, place or tenement in order to establish the "character" of such premises as a common nuisance, but the notorious "character" of any such premises shall be evidence that such premises are nuisances. It was held by the court that testimony of witnesses as to the "reputation" of the defendant's premises might be considered under the statute as testimony with reference to the "character" of the premises, the words "character" and "reputation" being synonymous. The court does refer approvingly to the rule in *State* vs. *Beswick, supra.* All of this has nothing to do with our argument as to the rule of convenience.

People vs. *Toynbee,* 20 Barb. 168 (appellants' brief, page 42).

In this case there was considered a New York statute providing for the prevention of intemperance, pauperism and crime. The statute declared that intoxicating liquors shall not be sold or kept

for sale, etc., except by the persons and for the special uses mentioned in the act. Section 17 of the act declared that upon the trial of any complaint under the act, proof of delivery shall be proof of sale, and proof of sale shall be sufficient to sustain an averment of unlawful sale. The court declared this provision to be unconstitutional.

This has no particular bearing upon our question as to the applicability of the rule of convenience under the facts of our case.

Wynehamer vs. *People,* 13 New York, 387 (appellants' brief, page 42).

In this case we have a New York statute for the prevention of intemperance, pauperism and crime. The act was held unconstitutional because it did not discriminate between such liquors as were possessed by the defendant when the act took effect as a law, and such as might thereafter be acquired by importation or manufacture.

This has not even a remote bearing on the question now before this court.

People vs. *Lyon,* 26 Hun. 180 (appellants' brief, page 43).

In this case there was a New York statute authorizing the issuing of licenses for the sale of spirituous liquors or wines in quantities less than five gallons, but not to be consumed upon the premises. There was a provision in this act that "whenever any person is seen to drink in such shop or house, out-

house, yard or garden belonging thereto any spirituous liquors or wines, forbidden to be drank therein, it shall be *prima facie* evidence that such spirituous liquor or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein." It was held that as the unlawful act of a third person with which the accused was not necessarily connected was thereby made *prima facie* evidence of his having committed a criminal offense, the law was unconstitutional, as it deprived the accused of his right to a trial by jury.

There would seem to be sound reasoning for the conclusion of the court, but this has nothing to do with the rule of convenience.

People vs. *Cannon,* 139 N. Y. 32; 34 N. E. 759 (appellants' brief, page 43).

In this case a New York statute made it a misdemeanor for anyone to fill up with soda water, etc., registered stamped bottles of manufacturers of soda water, etc., or to deface the stamp thereon, or to sell, buy, etc., the same without the written consent of, or unless the same shall have been purchased from the person whose stamp is thereon. There was a provision in the statute that the possession by a dealer in secondhand articles of any registered, stamped bottles, without the written consent of the owner of the stamp, would be presumptive evidence of unlawful use, purchasing and

traffic therein. The court held this to be a proper legislative enactment, there being such connection between the possession and an unlawful traffic therein as to make it proper presumptive evidence of guilt.

The court went on to describe limitations which must be kept in mind in enacting such statutory presumptions. That is, "the limitations are that the fact upon which the presumption is to rest must have some fair relation to or natural connection with the main fact."

There is nothing in this case at all involving the question of the right to adopt the rule of convenience.

Hammond vs. *State,* 84 N. E. 416 (appellants' brief, page 43).

This case held that in an anti-trust law of the State of Ohio, a section thereof providing that "the character of the trust or combination alleged may be established by proof of its general reputation as such" is unconstitutional and void in that it prescribes a rule of evidence which is violative of the constitutional guarantee contained in the Fourteenth Amendment to the United States Constitution.

It was not possible in this case for the court to consider the rule of convenience.

State vs. *Momberg,* 103 N. W. 566 (appellants' brief, page 43).

In this case there was a North Dakota statute which made the fact that one has or keeps posted in or about his place of business a United States revenue receipt or license for the sale of distilled malt or fermented liquor *prima facie* evidence that he is selling and keeping for sale intoxicating liquor contrary to law.

It was held that this *prima facie* presumption was not conclusive and for the court to so instruct was error.

This has no bearing upon our argument with reference to the pertinency of the rule of convenience under the facts of our case.

State vs. *Potello,* 119 Pac. 1023 (appellants' brief, page 43).

In this case, decided by the Supreme Court of Utah, there was a statute providing that the possession of property recently stolen when the possessor fails to make satisfactory explanation shall be deemed *prima facie* evidence of his guilt. It was held that this provision of the statute was not invalid as encroaching upon the judiciary on the theory that mere proof of the larceny and of accused's recent possession requires a conviction.

The court construed the statute as creating nothing more than a *prima facie* presumption which meant "presumptive" evidence, the term not meaning that unless refuted by other evidence or discredited by circumstances the proof becomes

conclusive as to guilt. The only evidence introduced in that trial concerning the larceny was afforded by the defendant's evidence and that showed that the larceny was committed by another.

There was no possibility for the court to consider the logic of our rule of convenience.

Bailey vs. *State of Alabama,* 219 U. S. 219 (appellants' brief, page 48).

In this case an Alabama statute was before the United States Supreme Court. The statute declared that a presumption of fraud should arise from a mere breach of contract.

Here, again, there is no question of the propriety of the rule of convenience. There could have been no discussion or consideration by the court of the soundness of the rule made necessary by the circumstance of a fact, essential to be proved, being peculiarly within the knowledge of the defendant and readily provable by him.

For some of the reasons above indicated we made our motion to dismiss, which motion this court has taken under advisement, to be finally determined at the hearing on the merits. That is, we urged in said motion that the appellants have not presented a substantial Federal question which is open for decision at the present time.

We further urged that the question upon which it is claimed the jurisdiction of the United States

Supreme Court depends is so frivolous as to not need further argument.

Further, we moved for dismissal because the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

In conclusion, the State of California has successfully sustained the constitutionality and validity of its Alien Land Act in many cases over a period of several years, decided by State and Federal courts and by the United States Supreme Court. If now the validify of our 1927 legislation is not sustained, the successful prosecution of earlier cases will be practically of no avail, for the reason that the law which has been sustained by these various courts, including the United States Supreme Court, will not be enforceable.

Counsel for appellants suggests in his brief, at pages 50 and 51, that we have sufficient means of enforcement of Alien Land Act legislation by reason of section 9b of the Alien Land Act, which has been finally sustained by the courts. This section permits additional proof by the State of the race of the defendant. That is, proof of race inelligible to citizenship. The two sections, 9a and 9b, were adopted by the same statute at the 1927 session of the Legislature.

An experience of many years in confronting manifest difficulties of proof convinced the Attorney General's office and the various district attorneys of

the State, that the State was entitled to both of these sections in the Alien Land Act. Section 9b rendered possible proof in certain cases which theretofore had not been provable.

However, there still remain a multitude of cases that are not helped by section 9b. In many cases we may have a Mexican or a Chinaman or a Japanese with no records of birth available, with no facilities for visiting the country of their assumed nativity, and with no witnesess to testify as to the birth or as to the parentage of these persons. We know that on the Pacific coast many such persons have been smuggled into the United States contrary to law, and proof of their nativity or race is impossible.

If our reasoning in this case is logical, we are just as much entitled to section 9a as we are to section 9b of the Alien Land Act. If the final decision of the Supreme Court of the State of California sustaining section 9b and the refusal of the United States Supreme Court to entertain jurisdiction of an appeal from another decision involving the same section 9b be correct, then we submit that the ruling of the State Supreme Court sustaining section 9a in the present case should be sustained by the United States Supreme Court. The ruling referred to by the United States Supreme Court refusing to entertain jurisdiction was in the case of *George Morrison and H. K. Ozaki, Appellants,* vs. *The People of the State of Cali-*

fornia, 288 U. S. 591; 53 Sup. Ct. Rep. 401.

It is respectfully submitted that the judgment of the Supreme Court of the State of California should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 487.—October Term, 1933.

George Morrison and H. Doi, Appellants, *vs.* The People of the State of California, Appellee. } Appeal from the Supreme Court of the State of California.

[January 8, 1934.]

Mr. Justice Cardozo delivered the opinion of the Court.

The appellants have been convicted of a conspiracy to violate the Alien Land Law of the State of California.

The indictment charges that the two appellants, Morrison and Doi, feloniously conspired to place Doi in the possession and enjoyment of agricultural land within the state; that possession was obtained, and the land used and cultivated, in execution of the conspiracy; and that Doi was an alien Japanese, ineligible to citizenship, and not protected in his possession by any treaty between the Government of the United States and the Government of Japan. These acts, if committed with the guilty knowledge of each defendant, make out a criminal conspiracy under the statutes of the state.

On the trial the state proved that Doi had gone upon the land and used it under an agreement with Morrison, but did not attempt to prove that he was not a citizen of the United States or that he was ineligible for citizenship. The statutes of California provide that as to these elements of the crime the burden of disproving guilt shall rest on a defendant. By § 9a of the Alien Land Law as amended in 1927 (California Statutes, 1927, p. 880, c. 528), it is enacted that "in any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any provisions of this act, when the proof introduced by the state, or the people thereof, establishes the acquisition, possession, enjoyment, use, cultivation, occupation, or transferring of real property or any interest therein, or the having in whole or in part the beneficial use thereof by any defendant, or any of such fact(s), and the complaint, indictment or information alleges the alienage or ineligi-

bility to United States citizenship of such defendant, the burden of proving citizenship or eligibility to citizenship shall thereupon devolve upon such defendant." At the same session of the legislature, the Code of Civil Procedure of the state was amended by the addition of a new section (1983) which in substance and effect restates the same rule. California Statutes, 1927, p. 434, c. 244. Applying these statutes to this case, the trial judge held (a jury having been waived) that both the defendants, Morrison as well as Doi, were guilty of conspiracy. They were sentenced to be imprisoned for two years, but the sentences were suspended, and the defendants placed upon probation. There was an appeal to the District Court of Appeal for the Fourth District, where the judgment was affirmed. The court overruled the defendants' contention that by the application of § 9a of the Alien Land Law and § 1983 of the Code of Civil Procedure, there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. 13 Pac. (2d) 803. The cause was then transferred to the Supreme Court of California. There defendants' contention under the Fourteenth Amendment was again overruled, and the conviction was affirmed, three judges dissenting. 85 California Decisions 666; 22 Pac. (2d) 718. An appeal to this court followed.

A person of the Japanese race is a citizen of the United States if he was born within the United States. *United States* v. *Wong Kim Ark,* 169 U. S. 649. He is a citizen, even though born abroad, if his father was a citizen, provided, however, that this privilege shall not exist unless the father was at some time a resident of the United States as well as a citizen, and provided also that such a child, who continues to reside abroad, shall be required upon reaching the age of eighteen years to record at an American consulate his intention to become a resident and remain a citizen of the United States, and shall be further required to take the oath of allegiance to the United States upon attaining his majority. R. S. § 1993; 8 U. S. C. § 6; *Weedin* v. *Chin Bow,* 274 U. S. 657; see also R. S. § 2172; 8 U. S. C. § 7. But a person of the Japanese race, if not born a citizen, is ineligible to become a citizen, i. e., to be naturalized. The privilege of naturalization is confined to aliens who are "free white persons, and to aliens of African nativity and to persons of African descent." R. S. § 2169; 8 U. S. C. § 359.

in order to receive the protection of this Government

"White persons" within the meaning of the statute are members of the Caucasian race, as Caucasian is defined in the understanding of the mass of men. *Ozawa* v. *United States*, 260 U. S. 178; *Yamashita* v. *United States*, 260 U. S. 199; *United States* v. *Thind*, 261 U. S. 204, 214; *Terrace* v. *Thompson*, 263 U. S. 197; *Porterfield* v. *Webb*, 263 U. S. 225; *Webb* v. *O'Brien*, 263 U. S. 313; *Cockrill* v. *California*, 268 U. S. 258. The term excludes the Chinese (*United States* v. *Wong Kim Ark*, *supra*; 8 U. S. C. § 363), the Japanese (cases *supra*), the Hindus (*United States* v. *Thind*, *supra*), the American Indians (*Ozawa* v. *United States*, *supra*) and the Filipinos (*Toyota* v. *United States*, 268 U. S. 402), though Indians and Filipinos who have done military or naval service may be entitled to special privileges (8 U. S. C. §§ 3, 388). Nor is the range of the exclusion limited to persons of the full blood. The privilege of naturalization is denied to all who are not white (unless the applicants are of African nativity or African descent); and men are not white if the strain of colored blood in them is a half or a quarter, or, not improbably, even less, the governing test always (*United States* v. *Thind*, *supra*) being that of common understanding. *Dean* v. *Comm.*, 4 Gratt. (45 Va.) 541; *Gentry* v. *McMinnis*, 3 Dana (Ky.) 382; *In re Camille*, 6 Fed. 256; *In re Young*, 198 Fed. 715, 717; *In re Lampitoe*, 232 Fed. 382; *In re Alverto*, 198 Fed. 688; *In re Knight*, 171 Fed. 299; 2 Kent Comm. (12th ed.) 73, note. Cf. the decisions in the days of slavery: *Gentry* v. *McMinnis*, 3 Dana (Ky.) 382; *Morrison* v. *White*, 16 La. Ann. 100, 102; see *Scott* v. *Raub*, 88 Va. 721, 727-9.[1]

The California Land Law must be read in the light of these rulings as to the effect of birth and race. Section 1 of the Act (Cal. Stat. 1923, p. 1020, amending Cal. Stat. 1921, p. lxxxiii) provides that all aliens eligible for citizenship may acquire and occupy real property to the same extent as citizens. Section 2 provides that aliens not eligible for citizenship may use and occupy real property to the extent prescribed by any treaty between the Government of the United States and the nation or country of which such alien is a citizen or ~~country~~ subject, "and not otherwise." There is a treaty between the United States and Japan (37 Stat. 1504) by which the Japanese may own or lease houses, manufactories, ware-

[1]The opinions in Jeffries *v.* Ankeny, 11 Ohio 372 and Gray v. State, 4 *id.* 353, rest upon peculiar provisions of the Ohio Constitution.

houses, and shops, and may lease land for residential and commercial purposes. The treaty does not confer a privilege to own or use land for the purposes of agriculture. *Webb* v. *O'Brien, supra,* p. 323; *Frick* v. *Webb,* 263 U. S. 326. Section 3 of the Act prescribes the rule applicable to the acquisition of shares in corporations organized by aliens for the occupation or use of land; Sections 4 and 5 prescribe the rule for alien trustees and guardians; sections 7, 8, and 9 provide for the escheat to the state of any interest in real property unlawfully acquired. Section 10 provides that "if two or more persons conspire to violate any of the provisions of this act they are punishable by imprisonment in the county jail or state penitentiary not exceeding two years or by a fine not exceeding five thousand dollars, or both." This is the section under which the defendants have been convicted. There is nothing in the statute whereby unlawful occupation of land by an alien ineligible for citizenship is declared to be a crime unless the occupation has been acquired by force of a conspiracy.

This court in *Morrison* v. *California,* 288 U. S. 591,[2] passed upon a controversy as to the validity of § 9b of the California Land Law, which, though akin to § 9a, has important elements of difference. This section (9b) provides in substance that when it has been proved that the defendant has been in the use or occupation of real property and when it has also been proved that he is a member of a race ineligible for citizenship under the naturalization laws of the United States, the defendant shall have the burden of proving citizenship as a defense.[3] We sustained that enactment when

[2]The appeal was dismissed for the want of a substantial federal question upon a statement as to jurisdiction, and without argument of counsel.

[3]Sec. 9b. In any action or proceeding, civil or criminal, by the State of California, or the people thereof, under any of the provisions of this act, when the complaint, indictment or information, alleges the alienage and ineligibility to United States citizenship of any defendant, proof by the state, or the people thereof, of the acquisition, possession, enjoyment, use, cultivation, occupation or transferring of real property or any interest therein, or the having in whole or in part of the beneficial use thereof by such defendant, or of any such facts, and in addition proof that such defendant is a member of a race ineligible to citizenship under the naturalization laws of the United States, shall create a prima facie presumption of the ineligibility to citizenship of such defendant, and the burden of proving citizenship or eligibility to citizenship as a defense to any such action or proceeding shall thereupon devolve upon such defendant. Cal. Stats. 1927, c. 528, p. 881.

challenged as invalid under the Fourteenth Amendment of the federal constitution. The state had given evidence with reference to the defendant, the occupant of the land, that by reason of his race he was ineligible to be made a citizen. With this evidence present, we held that the burden was his to show that by reason of his birth he was a citizen already, and thus to bring himself within a rule which has the effect of an exception. In the vast majority of cases, he could do this without trouble if his claim of citizenship was honest. The People, on the other hand, if forced to disprove his claim, would be relatively helpless. In all likelihood his life history would be known only to himself and at times to relatives or intimates unwilling to speak against him.

The ruling was not novel. The decisions are manifold that within limits of reason and fairness the burden of proof may be lifted from the state in criminal prosecutions and cast on a defendant. The limits are in substance these, that the state shall have proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression. Cf. Wigmore, Evidence, Vol. 5, §§ 2486, 2512 and cases cited. Special reasons are at hand to make the change permissible when citizenship *vel non* is the issue to be determined. Citizenship is a privilege not due of common right. One who lays claim to it as his, and does this in justification or excuse of an act otherwise illegal, may fairly be called upon to prove his title good. In accord with that view are decisions of this court in proceedings under the acts of Congress for the deportation of aliens. A Chinaman by race resisted deportation on the ground that though a Chinaman, he had been born in the United States. The ruling was that as to the place of birth the burden was upon the alien, and not upon the Government. The ruling also was that the imposition of that burden did not deprive the alien of his constitutional immunities. *Chin Bak Kan* v. *United States,* 186 U. S. 193, 200. "The inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency without being able to show that it was ever possessed." *Ibid.* See also: *Ah How* v. *United States,* 193 U. S. 65,

76; *Christy* v. *Leong Don,* 5 F. (2d) 135. Cf. *Ng Fung Ho* v. *White,* 259 U. S. 276, 283. We adhered to that principle in *Morrison* v. *California, supra.* Upon that basis, we approved the ruling of the Supreme Court of California (*Peo.* v. *Osaki,* 209 Cal. 169) that § 9b of the Alien Land Law casting upon a Japanese defendant the burden of proving citizenship after proof of his race had been given by the state was not an impairment of his immunities under the federal constitution. No point was made in the statement of jurisdiction or the supporting brief that the crime was conspiracy and that one of the defendants belonged to the white race. The case was submitted as if both were Japanese.

The question is now as to § 9a. Obviously there is a wide difference between the scope of the two sections. Possession of agricultural land by one not shown to be ineligible for citizenship is an act that carries with it not even a hint of criminality. To prove such possession without more is to take hardly a step forward in support of an indictment. No such probability of wrongdoing grows out of the naked fact of use or occupation as to awaken a belief that the user or occupier is guilty if he fails to come forward with excuse or explanation. *Yee Hem* v. *United States,* 268 U. S. 178, 183, 184; *Luria* v. *United States,* 231 U. S. 9, 25; *Casey* v. *United States,* 276 U. S. 413, 418; *Mobile etc. R. Co.* v. *Turnipseed,* 219 U. S. 35, 42, 43; *Bailey* v. *Alabama,* 219 U. S. 219, 233, 238; *Manley* v. *Georgia,* 279 U. S. 1; *People* v. *Cannon,* 139 N. Y. 32. "The legislature may go a good way in raising [a presumption] or in changing the burden of proof, but there are limits." *McFarland* v. *American Sugar Co.,* 241 U. S. 79, 86. What is proved must be so related to what is inferred in the case of a true presumption as to be at least a warning signal according to the teachings of experience. "It is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland* v. *American Sugar Co., supra; Bailey* v. *Alabama, supra; Manley* v. *Georgia, supra.* There are, indeed, "presumptions that are not evidence in a proper sense but simply regulations of the burden of proof." *Casey* v. *United States, supra.* Even so, the occasions that justify regulations of the one order have a kinship, if nothing more, to those that justify the others. For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance

(*Yee Hem* v. *United States, supra; Casey* v. *United States, supra*), or if this at times be lacking, there must be in any event a manifest disparity in convenience of proof and opportunity for knowledge, as, for instance, where a general prohibition is applicable to every one who is unable to bring himself within the range of an exception. Greenleaf, Evidence, Vol. 1, § 79.[4] The list is not exhaustive. Other instances may have arisen or may develop in the future where the balance of convenience can be redressed without oppression to the defendant through the same procedural expedient. The decisive considerations are too variable, too much distinctions of degree, too dependent in last analysis upon a common sense estimate of fairness or of facilities of proof, to be crowded into a formula. One can do no more than adumbrate them; sharper definition must await the specific case as it arises.

We turn to this statute and endeavor to assign it to its class. In the law of California there is no general prohibition of the use of agricultural lands by aliens, with special or limited provisos or exceptions. To the contrary, it is the privilege that is general, and only the prohibition that is limited and special. Without preliminary proof of race, occupation of the land is not even a suspicious circumstance. The inquiry must therefore be whether occupants so situated may be charged with the burden of proving themselves eligible and thus establishing their innocence.

First. The indictment is for conspiracy, and, indeed, the Alien Land Act creates no other crime. *In re Akado,* 188 Cal. 739, 742; *Mott* v. *Cline,* 200 Cal. 434, 448; *California Delta Farms* v. *Chinese*

[4]Instances of the application of this principle can be cited in profusion. The cases that follow are typical examples: King *v.* Turner, 5 Mau. & Sel. 206, where a defendant having game in his possession in violation of a statute whereby possession was generally a crime, was held to have the burden of proving his special qualifications (cf. Yee Hem *v.* United States, *supra;* also Spieres *v.* Parker, 1 T. R. 144, per Lord Mansfield); Fleming *v.* People, 27 N. Y. 329, a prosecution for bigamy, where on proof that the defendant had contracted a second marriage during the lifetime of his first wife, the burden was laid upon him to prove exceptional circumstances that would have made the marriage lawful; and finally such cases as Potter *v.* Deyo, 19 Wend. 361, 363, and United States *v.* Turner, 266 Fed. 248 (typical of a host of others) where a defendant has been subjected to the burden of producing a license or a permit for a business or profession that would otherwise be illegal. Cf. United States *v.* Heyward, 26 Fed. Cas. 240; Board of Comm'rs of Excise *v.* Merchant, 103 N. Y. 143.

American Farms, 207 Cal. 298, 308. Morrison and Doi are charged to have conspired, but Doi alone is charged to be ineligible for citizenship. One might suppose from a reading of the statute that the burden of proof, even if shifted as to him, would be unaffected as to Morrison. The California courts, however, have cast the same burden upon both; and both have been convicted. None the less, in applying the presumption, we must keep before us steadily the quality of their crime. It is impossible in the nature of things for a man to conspire with himself. *Turinetti* v. *United States,* 2 F. (2d) 15, 17. In California as elsewhere conspiracy imports a corrupt agreement between not less than two with guilty knowledge on the part of each. *People* v. *Richards,* 67 Cal. 412; *People* v. *Kizer,* 22 Cal. App. 10, 14; *People* v. *Entriken,* 106 Cal. App. 29, 32; *Sands* v. *The Commonwealth,* 21 Gratt. (Va.) 871, 899; *Pettibone* v. *United States,* 148 U. S. 197, 203, 205.

Now, plainly as to Morrison, an imputation of knowledge is a wholly arbitrary presumption. He may never have seen Doi before the transfer of possession or afterwards. He may have made his agreement by an agent or over the telephone or by writings delivered through the mails. Even if lessor and lessee came together face to face, there is nothing to show whether Doi was a Japanese of the full blood, whose race would have been apparent to any one looking at him. Moreover, if his race was apparent, he may still have been a citizen, for anything that was known to Morrison or others. The statute does not make it a crime to put a lessee into possession without knowledge or inquiry as to race and place of birth. The statute makes it a crime to put an ineligible lessee into possession as the result of a wilful conspiracy to violate the law. Nothing in the People's evidence gives support to the inference that Morrison had knowledge of the disqualifications of his tenant or could testify about them. What was known to him, so far as the evidence discloses, was known also to the People, and provable with equal ease. Only an arbitrary mandate could charge him with guilty knowledge as an inference of law if it were proved that Doi was not a citizen or eligible to become one. Still less can he be charged with such knowledge when Doi's disqualification is itself a mere presumption. In such circumstances the conviction of Morrison because he failed to assume the burden of disproving a conspiracy was a denial of due process that vitiates the judgment as to him. Nor is that the only consequence. Doi

was not a conspirator, however guilty his own state of mind, unless Morrison had shared in the guilty knowledge and design. *Pettibone* v. *United States, supra; Gebardi* v. *United States,* 287 U. S. 112, 123. The joinder was something to be proved, for it was of the essence of the crime. Without it there was a civil wrong, but not a criminal conspiracy, the only crime denounced. *In re Akado, supra.* The conviction failing as to the one defendant must fail as to the other. *Turinetti* v. *United States, supra; Williams* v. *United States,* 282 Fed. 481, 484; *Gebardi* v. *United States, supra.*

Second. The result will not be changed if we view the case on the assumption that possession by one ineligible, when it is the product of agreement, may be criminal as to the tenant who holds with guilty knowledge, though innocent as to the landlord who believes that all is lawful.

We have pointed out before that a lease of agricultural land, unaccompanied by evidence of the race of the lessee, conveys no hint of criminality. For the moment we assume, without intending to decide, that strong considerations of convenience, if they existed, might cast upon the tenant the burden of proving his qualifications and thus disproving guilt. The question will then be whether the normal burden of proof will so thwart or hamper justice as to create a practical necessity, without preponderating hardship to the defendant, for a departure from the usual rule.

In the vast majority of cases the race of a Japanese or a Chinaman will be known to any one who looks at him. There is no practical necessity in such circumstances for shifting the burden to the defendant. Not only is there no necessity; there is only a faint promotion of procedural convenience. The triers of the facts will look upon the defendant sitting in the court room and will draw their own conclusions. If more than this is necessary, the People may call witnesses familiar with the characteristics of the race, who will state his racial origin. The only situation in which the shifting of the burden can be of any substantial profit to the state is where the defendant is of mixed blood, the white or the African so preponderating that there will be no external evidence of another. But in such circumstances the promotion of convenience from the point of view of the prosecution will be outweighed by the probability of injustice to the accused. One whose racial origins are so blended as to be not discoverable at sight will often be unaware of them. If he can state nothing but his ignor-

ance, he has not sustained the burden of proving eligibility, and must stand condemned of crime.

Reflection will satisfy that the chance of this injustice is not remote or shadowy. Let us assume a charge that agricultural land has been occupied by Filipinos not born in the United States, and not entitled to the privileges growing out of service in the army or the navy. 8 U. S. C. § 388. They are then ineligible for citizenship, and subject to indictment under the laws of California if they have gone into possession in aid of a conspiracy. But Filipinos have intermarried with many other peoples. They have intermarried with whites and with Negroes and mulattos. A laborer, born in Canada, his parents apparently mulattos, but one of his grandparents a Filipino, according to the charge in an indictment, would be ignorant in many cases whether he was a Filipino or an African. The admixture of oriental blood might be too slight for his race to be apparent to the eye, and family traditions are not always well preserved, especially when the descendants are men and women of humble origin, remote from kith and kin. The same possibility of injustice would be present where the occupant of the land is a descendant of Mexicans and Indians,[5] or an Eurasian,

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[5]Indians not born in the United States and not entitled to the special privileges growing out of service in the war (8 U. S. C. § 3) are ineligible for citizenship.

There is a strain of Indian blood in many of the inhabitants of Mexico as well as in the peoples of Central and South America. Robert F. Foerster, The Racial Problems involved in Immigration from Latin America and the West Indies to the United States, Report to Secretary of Labor, 1925, pp. 7, 10, 15, 17, 18, 21, 22, 23, 24, 28, 29, 41.

Whether persons of such descent may be naturalized in the United States is still an unsettled question.

The subject was considered in Matter of Rodriguez, 81 Fed. 337, but not all that was there said is consistent with later decisions of this court. Ozawa *v.* United States, and United States *v.* Thind, *supra.* Cf. In re Camille, *supra.*

Mexicans have migrated into California in increasingly large numbers (T. F. Woofter, Jr., Status of Recial and Ethnic Groups in "Recent Social Trends," Vol. 1, pp. 553, 562, 572, 573); and there have developed racial problems which have been considered by official bodies. California Departments of Industrial Relations, Agriculture and Social Welfare, "Mexicans in California," Report by Governor C. C. Young's Mexican Fact Finding Committee, San Francisco, Cal., 1930, pp. 41, *et seq.*

The treaty of Amity, Commerce, and Navigation of 1831 between the United States and Mexico gives to the nationals of either country the privi-

his ancestors partly Europeans and partly Asiatics.[6]

The probability is thus apparent that the transfer of the burden may result in grave injustice in the only class of cases in which it will be of any practical importance. The statute does not say that the defendant shall be acquitted if he does not know his racial origin and is unable to make proof of it. What the effect of such a law would be, we are not required to consider. To the contrary, the statute says in substance that unless he can and does prove it, he will have failed to discharge his burden, and will therefore be found guilty. Moreover, if he were to profess ignorance, and ignorance were an excuse, the trier of the facts might refuse to credit him. Holmes, J. in *Ah How* v. *United States, supra,* p. 76. There can be no escape from hardship and injustice, outweighing many times any procedural convenience, unless the burden of persuasion in respect of racial origin is cast upon the People.

What has been written applies only to those provisions of the statute that prescribe the rule for criminal causes. Other considerations may or may not apply where the controversy is civil. We leave that question open.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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lege of owning personal estate in the other (Art. XIII), but contains no provision in respect of the ownership of land. This treaty was revived after the Mexican War by Article XVII of the Treaty of Guadalupe Hidalgo (1848). It was terminated by Mexico in November, 1881. See Malloy, Treaties, Vol. 1, p. 1085.

[6]As to the appearance of children of marriages between Japanese and the white races, see: S. C. Gulick, The American Japanese Problem, p. 153; Iyenaga and Sato, Japan and the California Problem, p. 157.